

The University of Chicago

TRANSIT BY AIR IN INTERNATIONAL LAW

A PART OF A DISSERTATION SUBMITTED TO
THE FACULTY OF THE DIVISION OF THE
SOCIAL SCIENCES IN CANDIDACY FOR THE
DEGREE OF DOCTOR OF PHILOSOPHY

DEPARTMENT OF POLITICAL SCIENCE
JUNE, 1941

By
CARL QUIMBY CHRISTOL, JR.

CHICAGO, ILLINOIS

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CHAPTER I

INTRODUCTION

The development of aviation has brought many revolutionary changes to our modern civilization. With the multitudinous technological improvements that have been made of aviation an accepted technique of transit there have come a myriad of significant alterations affecting the habits of thought and action of both individuals and nations. Scarcely any human attitude or action has not in some way been influenced or conditioned by the increasing rapidity of aerial movement. The importance of these influences is just now being realized.

Aerial transit, which is essentially international in character, is now for the first time coming to be evaluated in terms of the various contributions it has made or is making to our present manner of living. A new and tremendous field is rapidly being opened for social study. A part of such study must necessarily include an interpretation of the purely legal or juridical aspects of this recently discovered device of transportation. For those who are willing to pursue the legal aspects of aerial development there may be assured a fascinating exploration and an opportunity to leave an impression upon a field of law that has not yet become static and in the immediate future is not likely to become so.

The creation of the law of the air has been almost as rapid as the growth of aerial transit upon a national and international scale. Modern air law has made a serious effort to keep abreast of the times. However, because of the comparative newness

of all forms of aviation and the difficulty of evaluating its social worth, legal thinking on this subject is still in the process of evolution. A strict and final form of the law of the air has not yet been attained, and while a great deal has been realized in the formation of principles, much room for development still remains.

It would be an overwhelming task to deal with the law of the air applicable in time of peace and war or even to consider all of the peace time portions of international air law. The latter phase may be divided satisfactorily into public and private international air law, and in order that this particular study may be confined to a reasonable limit, it has been decided to consider only the public aspects of the law applicable in time of peace. This phase of international air law has been most widely developed. By drawing together the major issues in this field, it is hoped that a useful contribution may be made to the better understanding of international aerial relations.

The content of the peace time public international law of the air has had its origin in two major sources. In the first place, our modern conception of this body of law has eventuated from the debates of the international lawyers and publicists that composed two distinguished bodies: the Institut de Droit International in its sessions of 1902, 1906, and 1911, and the International Law Association in 1912 and in 1913. Secondly, there have been a number of international conferences that have resulted in the formulation of international conventions dealing with the right of aircraft to engage in international aerial transit and commerce. An unsuccessful conference was held in Paris in 1910, and conventions were agreed upon at the Paris Conference in 1919, the Madrid Conference of 1926, and the Havana Conference of 1928.

Upon these two sources in the main, the first theoretical and the second practical, has international air law depended for its foundation. The development of the law from these sources has depended primarily upon those agencies that were created later to assist in the ordering of air transit.

Following the development of aircraft and international aviation, from potentiality to actuality, a number of important legal problems have confronted States. The most important single problem has been the need for deciding between two conflicting theories of the air space, the first holding that the air is free, and, the second that it is subject to the sovereign control of the subjacent State. The solution of this problem has fallen into three different periods; first, the period prior to October 12, 1919, when no binding multilateral governmental agreement had been reached; second, the period from the Paris Convention of 1919 down to the Havana Convention of 1928 when the principle of sovereign control came to be accepted almost universally; and, third, the period since 1928 in which the application of the principle has been defined and qualified.

A second major problem affecting international aerial transit, a corollary to the principle of sovereign control of the airspace, has been the problem of regulating innocent aerial passage. With the acceptance of the limitative principle the tendency has been to extend the privilege of innocent passage as widely as possible. This tendency has been fostered since 1919 by public and private international organizations interested in realizing for commerce and humanity the advantages of international aviation. This has resulted in a consistent effort to achieve a freer system of international aerial transit.

A third major problem has been the establishment of inter-

national administrative organizations able to deal effectively with the technical and administrative problems that have arisen continually following the acceptance of the principle of sovereign control of the airspace. Upon such bodies as the International Air Navigation Commission (CINA), the Advisory and Technical Committee on Communications and Transit of the League of Nations (LON), the International Aeronautical Conference (CAI), and the nascent Permanent American Aeronautical Commission (CAPA), have fallen the sometimes overlapping duties of regulating international transit. An issue has arisen whether such international administrative organizations should be regional or universal. The system to the present has been one of competing regional bodies, the CINA representing Europe and some non-European States, and the CAPA and the Pan American Union representing the Americas.

Such organizations as the International Chamber of Commerce and the International Air Traffic Association have made successful efforts to influence public opinion and to secure action upon technical and administrative problems. Since 1928 matters of this kind have surpassed problems of policy and theory and have become the essential problems confronting aerial navigation. A consideration of the technical and administrative duties of such international bodies is necessary for an understanding of the conditions under which aircraft may operate across national boundaries.

The major issue affecting international aerial transit has been to decide whether transit should be free or limited. When the sovereign States decreed that such transit should be limited, a large number of lesser issues arose concerning the implications of this principle. These secondary problems have resulted from the actual operation of international aerial transit,

and often have been of a technical and administrative nature. These issues include the realization of suitable customs and port formalities for aircraft engaged in international commerce; the development of air law by analogy to the law of the sea; creation of rules to prevent smuggling, espionage, and the carriage of contagious disease; and regulation of the use of aircraft as places of asylum. Other equally important issues have arisen concerning the rules on salvage and assistance; the development of a degree of mutual respect for national certificates of airworthiness and certificates of competency despite an unquestioned lack of uniformity; the creation of forbidden areas and the acceptance of the principle that certain types of goods might not be carried in aircraft; the provision that aircraft engaged in international commerce must land at specified customs aerodromes; and provisions permitting national aircraft to enjoy exclusive rights in the transit of various persons and merchandise. Other important problems have included the nationality and registration of aircraft; the creation of Red Cross aircraft; the establishment of rules requiring the installation and employment of radio on aircraft that engage in various types of international service; and the rule of law to be applied to offenses committed on board aircraft either when in flight or when upon the ground. The development of special rights to expedite aerial communication and transit in times of normalcy and emergency has also received a position of importance.

It will be my purpose in the following pages to deal with the principle of sovereign control of the airspace, freedom of innocent passage, the influence of the analogy of maritime law upon air law, guarantees of airworthiness, national responsibility for aircraft, the role of international administrative organiza-

tions in air law, and to indicate the extent to which the international law of the air has presently developed.

5. Conclusion

The debates of international lawyers previous to 1919 justify three conclusions. In the first place, because of lack of any real precedent, there was an effort by some to draw an analogy between the sea and the air, to apply the principle of freedom of the sea to the air, and to establish as a principle the idea of freedom of the air or airspace. In the second place, there was the rejection by others of this broad theory, and acceptance instead of the theory that each State did and must have sovereign control of its airspace. In the third place, there was a general consensus of opinion that no matter which of the two contending theories were accepted, the subjacent State must always have certain rights of self-protection relating particularly to national defense, precautions against espionage, customs violations, and the spread of disease.

By 1914 it became clear that the theory of sovereign control of the airspace was securing greater approval than its opponent and that the analogy of freedom of the seas could not be permitted to dictate to the regime of the air. It was realized that the air was not the sea, aircraft were not ships, and that a complete analogy could not be made.

In concluding this study of the development of an acceptable principle of international air law, one may point out that two notably different means were employed by the Institut and the Association in their studies of the law of the air. These differences represented basic characteristics of the Anglo-American law as opposed to Continental law. In the former system the contents of air law were thought to depend upon an evolutionary process based upon actual needs, upon custom, and actual experience. When one compares this process with the early codes formu-

lated by Fauchille, one sees that the Continental system was one of conscious formulation. Thus, while the Association was content to consider the broader general principles of sovereign control and innocent passage, the Institut was prepared to discuss a great variety of details that in reality had to wait for the technological development of aircraft before any final or realistic position might be taken. As has been pointed out by Kuhn, many of the latter questions were "administrative rather than fundamental and in respect of these, the jurist and legislator must coöperate with the technician."¹⁰⁸

The contributions to the development of conventional international air law by the advanced and thoughtful legal experience that was to be found in the international lawyers who composed the private organizations interested in the development of air law cannot be overestimated. Through their careful study of the juridical problems involved in air transport, and because of their desire to hasten the development of aircraft and airways by preventing the birth of legal and political difficulties that were expected to, and did arise; they may be given credit for the extraordinarily rapid progress that has been made in international air law. The men who studied these questions of air law as publicists, teachers, and practitioners were also the men who came to serve as governmental advisers and experts at the various public conferences and congresses that followed. However, their main influence was directed upon the path that international air law has followed through their draft codes and writings. This material has served as guide posts to show the way. Today one

¹⁰⁸ Arthur K. Kuhn, "The Beginnings of an Aerial Law," American Journal of International Law, IV (1910), 131.

finds in conventions that are in force most of the principles upon which these men insisted. It is an unmistakable example of the influence of publicists upon the development of the law. It was inevitable that in more recent days there would be changes in the law, dependent upon new conditions, which the earlier fathers of the law could not be expected to foresee. Despite this, their contribution has been of an immense and lasting character.

CHAPTER III

SOVEREIGN CONTROL OF THE AIRSPACE--CONFERENCE CONCLUSIONS

1. The Paris Conference of 1910.

While efforts to establish multi-lateral conventions on air navigation were begun prior to the World War, the delegates to the only notable pre-war conference merely reproduced the debates that were rampant among the members of the Institut and the Association at that time. No convention was accapted until 1919.

The first serious effort to establish an international convention on aerial navigation was made as early as 1910 when the French Government convoked the First International Conference on Aerial Navigation in Paris. Diplomatic representatives from eighteen European States were present, and as a result of their labors they produced a fairly comprehensive draft convention which provided for the international regulation of such matters as the nationality and registration of aircraft, certificates for pilots, rules for landing and departure of aircraft, customs and tariffs, and several other aspects of public peace time aerial navigation. A Convention of fifty-five articles was prepared, and many of the essential portions of public air law were considered.¹

The Conference made a serious effort to achieve unanimity on one of the contending theories of control of the air, but the two theories were represented by protagonists as eloquent and as

¹France, Conference Internationale de Navigation Aérienne, Paris, 18 Mai-29 Juin 1910; (Paris: Imprimerie Nationale, 1910), pp. 188-204; Great Britain, Report of the Civil Transport Committee with Appendices, Cmd. 9218, Parliamentary Papers (1918), (London: His Majesty's Stationery Office, 1919), pp. 1-35.

determined as the lawyers of the two learned societies. The British representatives held to the theory of sovereign control and some of the continental representatives advocated the theory of freedom of the airspace. Since all of the provisions of the convention would have to depend in no small degree upon this basic provision, and since no accord could be reached upon such a principle, the Conference adjourned without making a concrete contribution to a conventional law of the air. Because of the wide difference of opinion as to which theory of air law should be accepted further conferences were discouraged, and no further meeting was held until the end of the World War.

Although the sovereignty principle did not form the basis for a multilateral convention until 1919, in 1913 a bilateral agreement between France and Germany was achieved which in effect, if not in words, made provision for aerial transit between those two States upon the assumption that each had complete control over its airspace and was free to prohibit or permit such aerial navigation as it saw fit.² This was the first bilateral convention dealing with problems of air transport.

This agreement between France and Germany was dated April 13, 1913, and went into effect upon the exchange of letters between Jules Cambon, French Ambassador in Berlin, and von Jagow of the German Foreign Office on July 26, 1913. The agreement was concerned primarily with the transit and landing of military aircraft, and such transit and landing were made to depend upon explicit permission granted by the respective governments to the aircraft of the other State. By making international aerial circulation dependent upon the will of the State over which transit was to

²Report of Twenty-Eighth Conference of the International Law Association, Madrid, 1913 (London: Richard Flint and Co., 1914), pp. 542-545. Le Temps, Paris, August 14, 1913.

take place these two governments agreed, as implicitly as if the provision for the exercise of exclusive sovereignty had been made in the convention, that international aerial circulation could not be thought to exist in a free airspace but must be made to depend upon the State's exclusive and complete control of such airspace.

2. The Paris Convention, 1919

The World War made two important contributions to the development of an international law of the air. In the first place, the huge technological development of aviation for peace time, but more especially military, purposes down to 1919 indicated the tremendous growth of a new form of international transit. There was the unquestioned indication that aircraft had come to stay, for by this time there had been a demonstration of the multiple uses to which such apparatus could be put. In the second place, there was a realization that aircraft could be used to advance the interests of society in time of peace, but that in time of war the destructive qualities of aircraft were supreme. Therefore, there was no doubt that aircraft engaging in international movement could take part in both friendly and hostile missions.

Hazeltine, one of the leading exponents of the theory of sovereign control of the airspace admitted frankly that the war experiences of the various States were great factors motivating toward its acceptance. He wrote:

The aerial practice of belligerent and neutral States during the war demonstrated conclusively that, in times of crisis, States assert their full and absolute sovereignty in the airspace above their territories and territorial waters; and it was no doubt this wartime practice of States which finally proved to the British Civil Aerial Transport Committee and to the States which have signed the new Air Navigation Convention the desirability of basing International Conventions and municipal legislation upon the full and absolute sovereignty of States usque ad coelum.³

³Report of the Twenty-Ninth Conference of the International

In view of the war psychology existing in 1919, States feared that foreign and possibly hostile aerial missions might be performed with great speed, and in consequence States desired a principle of air law that would protect them from the unfriendly military action of foreign aircraft. If such foreign aircraft might be restricted in its international movement, then States thought that their peace and security might be maintained, and since the theory of sovereign control of the airspace permitted the realization of this goal, there was an overwhelming desire that this theory of individual State control of the airspace should be made a part of the conventional law of the air.

This consensus of opinion was achieved in the drafting of the Convention Relating to the Regulation of Aerial Navigation of October 13, 1919, which was prepared at the Paris Peace Conference. Clemenceau was one of the keenest advocates for the international regulation of aerial transit both during the war and at the Peace Conference. His interest was expressed in a letter to President Wilson of February 16, 1919, which stated, in part:

I am pleased to note that you agree in principle with my proposition to create an aeronautic committee for after the war. I take the liberty of insisting on the necessity of creating this committee without delay, in order to be able to utilize it as an advisory organ of the Peace Conference. I cannot insist too strongly upon the imperious necessity of this study, on account of the proximity of Germany to London, Brussels, Paris and Rome.⁴

Wilson agreed to the need for the international regulation of aerial transit, and so he complied with Clemenceau's request to send two American representatives to the Inter-Allied Committee

al Law Association, Portsmouth, 1920, (London: Sweet and Maxwell, 1920), p. 390.

⁴Henry Woodhouse, Textbook of Aerial Laws and Regulations, (New York: Frederick A. Stokes, 1920), p. 13.

on Aeronautics on March 6th, 1919. It was this body that became the Aeronautical Commission of the Peace Conference, when on March 12, 1919, Balfour moved that such a body be established and that it be charged with the duty of preparing a convention to govern international aerial transit in time of peace. Under the Balfour resolution the representatives of the five States of the United States of America, France, Great Britain, Italy, and Japan were to constitute the Commission, but on the meeting of March 15th, the representatives of Belgium, Brazil, Cuba, Greece, Portugal, Rumania, and Serbia were added to the body that was to be charged with the drafting of a satisfactory international aerial convention.⁵ This Commission was given the following duties: (1) the study of questions related to aviation that would be submitted to it by the Supreme Council of the Peace Conference, (2) the study of all questions on aeronautics that it felt necessary to call to the attention of the Supreme Council, and (3) the drawing up of the Convention on aerial navigation.⁶

This body drew up a list of twelve basic principles that were to be incorporated into the Convention Relating to the Regulation of Aerial Navigation of October 13, 1919. The first article of this list of requisites included the statement:

1. Recognition: (1) of the principle of the full and absolute sovereignty of each State over the air above its territories and territorial waters, carrying with it the right of exclusion of foreign aircraft; (2) of the right of each State to impose its jurisdiction over the air above its

⁵D. H. Miller, My Diary at the Conference of Paris, (New York: Appeal Book Co., 1924-1926), XIV, 384; XV, 352; Kenneth Colegrove, International Control of Aviation, (Boston: World Peace Foundation, 1930), p.54.

⁶Albert Roper, La Convention Internationale du 13 Octobre 1919 portant réglementation de la Navigation Aérienne, son origine--son application-son avenir, (Paris: Recueil Sirey, 1930), pp. 35-53; C. L. Bouvé, "Regulation of International Air Navigation under the Paris Convention," Journal of Air Law, VI (1935), 300.

territory and territorial waters.⁷

Consequently, in order to be in accord with the air navigation agreement between France and Germany, and to follow the rules already laid down in such national legislation as the British Air Navigation Acts of 1913, and to support the need for sound national defenses, dramatically represented by the aerial hostilities during the war, the theory of sovereign control of the airspace came to be accepted at Paris, and the Convention provided finally:

Article I.-The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory.

For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto.⁸

The Convention in which this principle was enunciated was signed immediately by all of the leading powers of the world, including the United States of America, and from October 13, 1919, the principle of sovereign control of the airspace has been one of the fundamental principles of the law of the air. Although it evolved directly from an atmosphere of war and a feeling of lack of security, it has had its major application in the time of peace and regulated only peace time aerial transit.

3. The Madrid Convention, 1926

The Ibero-American Convention on Aerial Navigation was signed at Madrid on November 1, 1926. Unlike the parties to the Paris Convention of 1919, the parties to this Convention were of

⁷U. S. International Civil Aeronautics Conference, Washington, Dec. 12-14, 1928, Papers Submitted by the Delegates for Consideration of the Conference. (Washington: Government Printing Office, 1929) p.109.

⁸Convention Relating to the Regulation of Aerial Navigation, International Commission for Aerial Navigation, (Paris, 1938), p. 1.

a particular cultural unit. The States that signed this Convention included Spain, Portugal, and nineteen of the Latin American States. Haiti was the only Latin American State not represented at the Conference. The Madrid or Ibero-American Convention, as it has been known, came into force by March 18, 1928, but on the whole its influence has been rather negligible.

The main contribution of this Convention was the extension to additional States of the principle of sovereign control over the airspace found in the Paris Convention. The first articles of these two conventions were identical. The statement of principle at Madrid drove another wedge between the analogy of freedom of the seas and freedom of the air, and added a more universal approval to the principle advocated so long by the International Law Association.

There is a bit of interesting history behind this convention. Spain as an ex-neutral State had been invited to agree to the Paris Convention of 1919. However, Spain was not granted so many votes on the original International Commission of Air Navigation as were two other States of approximately equal standing, the two former belligerents, France and Italy. For this and other reasons, Spain did not and has not become a party to the Paris Convention of 1919.

In 1926 Spain was under the control of a dictator, Primo de Rivera, and when his request for a permanent seat on the Council of the League of Nations was refused, he instituted steps to take Spain out of the League of Nations. Because of the League's action, Spain's diplomatic fortunes sank to a low ebb, and she sought to recoup them by strengthening her influence in another area. Spain turned toward Latin America as a fertile place to exercise her influence, and in as much as Chile and Uruguay were the only

American States parties to the 1919 Convention, Spain decided to start the rebirth of her diplomatic prestige through the formulation of an international aerial convention.

The principle of sovereign control of the airspace as restated in this Convention has proven to be entirely suitable and proper for the regulation of peace time aerial relations between the contracting States. The Madrid Convention united a particular group of States in an agreement and in an administrative commission entirely separate and distinct from the agency established in Paris in 1919. From the point of view of unity and uniformity it would unquestionably have been wiser to have all the States of the world that were interested in the regulation of international aviation organized under a single central constitution and a single central administrative organization. From the point of view of the extension of the major principle of air law, sovereign control of the airspace, this Convention was able to make more universal than previously the right of States to permit the use of their airspace under the conditions that they might wish to impose.

4. The Havana Convention, 1928

As early as 1923 the American States began to see the necessity for the regulation of inter-American aviation. Particular emphasis was put upon the regulation of inter-American commercial aviation, and one of the basic ideas behind the growth of American regulation of aerial relations was the hope of making commercial intercourse freer between the American States.

The Fifth Pan-American Conference, Santiago de Chile, 1923, dealt with Pan American aviation by appointing an Inter-American Commercial Aviation Commission. This commission was authorized to draft a "bill of laws and regulations, the adoption of which

is to be recommended to all the American States, with respect to commercial aviation, the determination of aerial routes, the establishment of special customs procedure for aviation, and the determination of adequate landing policies, and it shall make recommendations with respect to the places at which said stations shall be established."⁹ A meeting of this commission was held in Washington in May of 1927, and it prepared a draft convention in which the following provision was made on the principle of sovereign control of the airspace: "1. The high contracting parties recognize that every power has complete and exclusive sovereignty over the air space above its territory and territorial waters."¹⁰

This draft was revised by the Director of the Pan American Union, and in the revised form was submitted to the Havana Conference in January of 1928. This article of the draft was accepted with minor variations by the twenty-one States of the Pan American Union. It repeated the principle now universally accepted in international law that a State has sovereign control over its airspace, in the following manner:

Art. I. The high contracting parties recognize that every state has complete and exclusive sovereignty above the air space above its territory and territorial waters.¹¹

This article was signed by all and ratified by eleven of the Pan American States.

The first article of the Havana Convention did not create

⁹Chile, Actas de las Sesiones Plenarias de la Quinta Conferencia Internacional Americana, II (Santiago de Chile, 1925), 368.

¹⁰Bulletin of the Pan American Union, LXI, (1927), 751.

¹¹U.S. Department of State, Sixth International Conference of American States, Final Act, Lotions, Agreements, Resolutions and Conventions, (Washington: Government Printing Office, 1928), p. 97.

any new principle of international air law for the American States, since practically all of them by one means or another had recognized the principle of sovereign control of the airspace prior to their approval of the Havana Convention. Rather, it restated in conventional form those principles already accepted in the national legislations of the various Pan American States, which legislation had in most cases sprung directly from the principles embodied in the Paris Convention of October 13, 1919.

Not only was the principle of sovereign control taken bodily from the Paris Convention and placed in the Havana Convention, but other matters were treated similarly in both agreements. There were few articles in the Havana Agreement that were radical departures from previous international conventions, and as Giannini has written, without any doubt "The Pan American Convention is an adaption of the Paris Convention to the exigencies of Pan American aviation..."¹²

With the entry into force of this treaty the principle of usque ad coelum must be considered as having become universally accepted. It has been the basis for the decisions of national courts, the opinions of administrative officers, national statutes, and many bilateral conventions. These, in addition to the three multi-lateral conventions now constitute the real bases for the public international law of the air in time of peace.

Since 1928 the Pan American system of public air law has been expanded through the holding of a large number of important inter-American conferences, with the most notable being held at Montevideo in 1933, Buenos Aires in 1935, and Lima in 1937. Resolutions, recommendations, and conventions have been urged at all

¹²Amedeo Giannini, "La Convenzione Panamericana Sull'Aviazione Commerciale," Il Diritto Aeronautico, VI (1929), 425-37.

of these conferences, and out of them have developed a further ordering of American aerial relations through international air law. These later efforts have resulted in the consolidation and in the simplification of the principle of sovereign control of the airspace as the foundation stone of international air law rather than in the development of any new principles.

5. Conclusions on the Sovereignty Theory

Today there is undoubtedly one principle of international air law accepted universally. It is that a State has sovereign control over its superjacent airspace. Conventions of multi-lateral and bilateral character attest to it.¹³

Publicists have recorded their belief that the sovereign control of superjacent airspace has come to stay. Jurists of all nations attest to this belief. In comparing the two early theories, Spaight has referred to the acceptance of the sovereign principle by stating that "The freedom of the air, which certain prophets envisaged in the early days of aviation, has proved to be a vision and no more."¹⁴ Oppenheim in affirming the acceptance of this principle of sovereign control recorded the decision undertaken at Paris in 1919, and he stated that "the parties recognized that every State has complete sovereignty over the air

¹³Note: Lists of bilateral Conventions and agreements have been assembled by Salvatore Cacopardo, Enquiries into Economic, Administrative and Legal Situation of International Air Navigation, (Geneva: League of Nations, 1930), C. 339. M. 139. 1930. VIII; Fred D. Fagg, "The International Air Navigation Conventions and the Commercial Air Navigation Treaties," Southern California Law Review, II (1929), 430-454; W. M. Gibson, "Bi-Partite Agreements on Aerial Navigation," Temple Law Quarterly, VI (1931), 57-86.

¹⁴J. M. Spaight, An International Air Force, (London: Gale and Polden, n.d.), p.71.

space and its territorial waters."¹⁵

The same point of view has been taken by a recent German writer on international air law. While affirming this principle he has held that the "free air theory has only an historical significance to-day."¹⁶ Spiropoulos writing in German has held that with the conclusion of the Paris Convention in 1919 that:

The sovereignty theory was recognized to its fullest extent...This new principle of international law, established as the result of the custom adhered to through the World War, has found its sanction in modern aerial jurisprudence. To those principles of international law already recognized, this new one is to be added: Aerial space above territorial land and water included within the boundaries of a State constitute an integral part of the sovereignty of a State.¹⁷

In referring to the principle of sovereign control of the airspace, A. Ambrosini has held that:

The proclamation of the principle of sovereignty--with the liberty relative to inoffensive passage sanctioned by article 2 of the Convention--has been the fortune of the Convention and the real reason for the rapid elaboration of an air law, relating to the public organization of air navigation and having, in its international uniformity, a world character.¹⁸

This principle has also been approved by such French jurists as de Lapradelle and Joseph Kroell.¹⁹ One of the American writers who has taken the same point of view was C. L. Bouvé.²⁰

States have further attested to their acceptance of the

¹⁵L. Oppenheim, International Law, edited by R. F. Roxburgh, (3rd ed.; London: Longmans, Green and Co., 1920), pp. 353-355.

¹⁶Werner Bartz, Deutsche Luftrechtspolitik seit Versailles, (Berlin: F. Dümmler, 1927), pp. 1-49.

¹⁷J. Spiropoulos, Der Luftram integrierender Teil des Staatsgebietes, (Leipzig: Rossberg, Leipzig, 1921), pp. 115-116.

¹⁸A. Ambrosini, "Sovranità e Traffico Aereo internazionale della Convenzione di Parigi 1919 a quella di Montreux 1936," Revue Aéronautique Internationale, VIII (1938), 130-131.

¹⁹Joseph Kroell, Traité de Droit International public Aérien, L'Aéronautique en temps de Paix, (Paris: Les Éditions Internationales, 1934).

²⁰"The Development of International Rules of Conduct in Air Navigation," Air Law Review, I (1930), 38.

principle of sovereign control of the airspace through national legislation, administrative rules and regulations, and the decisions of their courts. Taking the United States as an example one may refer to the statement made by the Department of Commerce in 1933 when it added its approval to the principle of sovereign control of the airspace as follows:

Air navigation arrangements are necessary for air commerce between nations because each nation claims sovereignty over the airspace above its territory. This is a principle recognized in international law--if a foreign aircraft proceeds over a nation's territory without proper authority, the nation is justified in taking any steps to halt the craft and investigate its mission.²¹

The principle of sovereign control of the airspace has also been approved in several American court decisions. The principle has been well stated by Justice Rugg of the Supreme Court of Massachusetts when he said:

It is essential to the safety of sovereign States that they possess jurisdiction to control the airspace above their territories. It seems to us to rest on the obvious practical necessity of self-protection. Every government completely sovereign in character must possess power to prevent from entering its confines those whom it determines to be undesirable. That power extends to the exclusion from the air of all hostile persons or demonstrations, and to the regulation of passage through the air of all persons in the interests of the public welfare and the safety of those on the face of the earth.²²

The complete acceptance of the principle of sovereign control of the airspace has brought certain evils with it despite the provisions ordinarily found in international aerial conventions to the effect that the various States would in time of peace accord freedom of innocent passage above their territory to the aircraft of the other contracting States. Aviation is by its very nature international. Admitting that sovereign control

²¹U.S. Department of Commerce, Air Commerce Bulletin, V (Washington: Government Printing Office, 1933), 151.

²²Harry Worcester Smith v. New England Aircraft Company, Incorporated, 270 Mass. 511, 521 (1930).

of the airspace is necessary and serves a useful purpose, it must also be realized that this principle may be carried so far as to limit unduly modern demands upon international aviation.

Since 1919 certain States have refused to permit aerial transit through their airspace relying upon their right to the sovereign control of their own airspace. As has been pointed out by Butler and Maccoby "Germany held up the development by Imperial Airways (the British air line) of its European routes, and Persia in 1927 held up the development of a weekly air service from Cairo to India."²³ However, such incidents have been comparatively rare, and States have made efforts not to impose hardships by senseless and unnecessary limitations upon aerial circulation. States have been enlightened generally to the extent of being able to visualize the benefits that might accrue to them from the development of international aviation, and because of this tempering factor the principle of sovereign control of the airspace has been acceptable.

²³S. G. Butler and Simon Maccoby, The Development of International Law, (London: Longmans, Green and Co., 1928), p.492.

CHAPTER IV

FREEDOM OF INNOCENT PASSAGE--THE PRINCIPLE

1. Conventional Provisions

A supplementary doctrine to the principle of State sovereignty over superjacent airspace has appeared in all of the important conventions dealing with the international law of the air. This provision which has been in the nature of a privilege granted and subject to revocation at will, has provided for the freedom of innocent passage of aircraft over the territory of contracting States. By virtue of its statement in such conventions as those of Paris of 1919, Madrid of 1926, and Havana of 1928 it has become accepted and recognized in international practice.

This corollary to the principle of State sovereignty has been based upon the assumption that international aerial transit must be permitted because it serves certain values of modern civilization and certain interests of modern States. The corollary, which has ordinarily been stated in the conventions immediately after the statement of the sovereignty principle, permits the use of the aerial domain of a State in times of peace by citizens of those contracting States who are engaged in innocent passage.

This privilege has had the purpose of toning down the hard and fast statement of a State's sovereign control of superjacent airspace, and has made possible the realization of the advantages of international transit. The ordinary provision is that the parties agree to accord reciprocally and without distinction of nationality freedom of innocent passage to the other signatories, provided that the various limitative conditions laid down in the

convention are observed. In order that aircraft might be entitled to this privilege it has had to observe the following conditions:

(1) bear nationality and registration marks and the name and address of its owner, and contain the necessary certificates, licenses and other documents; (2) comply with the regulations of the visited state as to prohibited areas, route of passage and landing and carriage of goods. Passage is denied to visiting aircraft (1) carrying explosives, arms and munitions of war, (2) competing with the aircraft of the visited state in commercial transport, if visited state so provides, of (3) being military, police or customs aircraft, unless a special authorization is obtained from the visited state.¹

The Aeronautical Commission of the Peace Conference in Paris in 1919 proposed twelve principles to be followed in the formulation of the 1919 Convention. The second of these principles dealt with the problem of freedom of innocent aerial transit to be accorded to international aviation by virtue of the acceptance of the sovereignty theory as follows:

2. Subject to the principle of sovereignty, recognition of the desirability of the greatest freedom of international air navigation in so far as this freedom is consistent with the security of the State, with the enforcement of reasonable regulations relative to the admission of aircraft of the contracting States, and with the domestic legislation of the State.²

This statement was the first of a long series of formal attempts to permit aerial transit to be as free as possible under the limitative principle. However, it has been clear that the various treaty provisions have granted only the privilege of innocent passage, and that this does not exist as a matter of right for foreign aircraft engaged in international transit. A State is still entitled to grant or withhold transit as it sees fit to do.

Following the plan suggested by the Aeronautical Commission the Convention Relating to the Regulation of Aerial Navigation of

¹G. D. Nokes and H. P. Bridges, The Law of Aviation, (London: Chapman and Hall, 1930), p. 10.

²International Civil Aeronautics Conference, Washington, 1928, Papers Submitted to the Conference, p. 101.

October 13, 1919, provided for the privilege of innocent passage in the following terms:

Art. 2.-Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed.

Regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality.³

A second reference was made to the right of a State to accord freedom of innocent passage during times of peace in the fifteenth article of the Convention. This article provided in part as follows:

Art. 15.-Every aircraft of a contracting State has the right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so...

Every aircraft which passes from one State into another shall, if the regulations of the latter State require it, land in one of the aerodromes fixed by the latter...

Every contracting State may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory.⁴

The statement of this corollary proved acceptable to those persons engaged in international aerial transit and to the States that had to be concerned primarily with their national defenses, and so when the effort to realize a Spanish American Convention on Aerial Navigation was made in November of 1926, it was decided to incorporate this doctrine into that Convention. The second article of the Ibero-American Convention provided in the same terms as the Paris Convention for the freedom of innocent passage in time of peace.

When the Inter-American Commission on Commercial Aviation met in Washington in 1928 for the purpose of considering bases for

³Convention, op. cit., p. 2.

⁴Ibid., p. 5.

the establishment of a Pan American Convention on Commercial Aviation it recommended freedom of innocent passage through the aerial space. The governing body of the Pan American Union, utilized this recommendation as a basis for discussion and the subsequent Havana Conference agreed, in article four of the Convention to establish the privilege of freedom of innocent aerial passage in the Americas. The Pan American Convention differed from those of Paris and Madrid only in limiting the privilege to private aircraft. The fourth article of the Havana Convention on Commercial Aviation provided:

Each contracting state undertakes in time of peace to accord freedom of innocent passage above its territory to the private aircraft of the other contracting states, provided that the conditions laid down in the present convention are observed. The regulations established by a contracting state with regard to admission over its territory of aircraft of other contracting states shall be applied without distinction of nationality.⁵

This article tempered the first article of the Convention, which had restated the principle of the sovereign control of airspace. Under the fourth article the signatory States agreed that in time of peace they would be motivated by a desire to permit as extensive freedom of innocent passage above their territories as was in accord with the best national interest.

It may be appropriate at this time to consider briefly the regime that provision for freedom of innocent passage has brought to exist in international aerial relations. The American system, based upon the Havana Convention, may serve as a practical example in this discussion. In this survey it must be kept in mind that while the Havana Convention lent weight to the previous statements of the basic principles, its real contribution was to

⁵Report of the Delegates of the United States of America to the Sixth International Conference of American States, op. cit., pp. 177-178.

aid in the extension of these principles. At Havana these principles were repeated in the form of an international and multi-lateral Convention, and a number of important States not active parties to the previous international conventions accepted them for the first time.

Article four of the Havana Convention, in conjunction with article twelve which dealt with the problem of certificates of airworthiness, raised the extremely important matter of the conditions under which private aircraft could take advantage of innocent passage. Private aircraft, as used in the Convention, included both tourist aircraft and commercial aircraft, in fact, all aircraft other than State aircraft.

The privilege of innocent passage is complicated by two extremely important factors. This is realized when one understands that while all of the Pan American States signed the Havana Convention, ten of these same States have not ratified the Convention, and presumably the privilege of innocent passages has been extended by these States only under strict conditions. This presumption has been heightened by the fact that almost all of the Pan American countries have passed complicated laws, have adopted strict administrative regulations, and have agreed upon bilateral conventions governing the flight of foreign aircraft within their jurisdiction.

An example of these special agreements was the one entered into by the United States and Colombia on February 23, 1929. This agreement, which was necessitated by Colombia's failure to adhere to the Havana Convention, provided that American aircraft should have the right of innocent passage above Colombian territory, might alight therein, fuel, make repairs, and take on and discharge passengers at specified places. Colombian aircraft were given simi-

lar rights in the United States, including the Panama Canal Zone, and aircraft of both States were to follow the immigration, sanitary, customs, and special regulations of the other.

These factors severely limit the scope of article four of the Convention. While the laws and regulations have for their purpose the prevention of flight by unsafe foreign craft;⁶ on the other hand, the special bi-lateral conventions have had for their purpose the establishment of procedures that simplify the cumbersome necessity of obtaining special authorization through diplomatic channels for special flights into and through foreign States. Such special authorization is particularly necessary when nationals of States that have not ratified the Havana Convention wish to enter another non-ratifying State or ratifying State's airspace. Special precautions have been established to insure that freedom of innocent passage be limited to transit that is truly innocent in character.

The laws restricting freedom of flight have been based primarily upon the disinclination of States to permit the loss of sovereign control over their airspace. These laws have also been based upon the fear that foreign owned and operated aircraft would seize a major portion of a State's aerial transportation business, upon the wide development of military aircraft and the fear that such aircraft might be put to unfriendly uses, upon the desire to prevent smuggling, and, finally, upon the desire to take every precaution against espionage.

⁶Note: This matter has been surveyed by Leland Hyzer in his "Pan American Air Regulations: A Comparative Study," Journal of Air Law, IV (1933), 536-548, where he has cited the laws or decrees of eighteen Pan American States as to the national requirements for "Certificates, Documents, and Conditions Precedent for the Entry of a Foreign Aircraft Into a Country or the Airspace Thereof"; James L. Brown, "Regulation of Air Navigation in Venezuela," Journal of Air Law, VIII (1937), 557-583.

Let us take the case of the United States in point. Many American private tourist aircraft or commercial aircraft have engaged in international flight.⁷ The problem has been officially explained as follows, so far as permission to participate in flight has been concerned:

There have been many flights of this kind by American aircraft in foreign countries, and it has been necessary to obtain special authorization for each flight to be made in any European country with which the United States has no reciprocal air navigation arrangement.⁸

The same generalization holds true for flight by American craft into Pan American States with whom the United States has had no general or special aviation agreement.⁹ Thus, it has become necessary to inquire into every specific aerial transit to learn if it were actually innocent in its purpose.

The procedure, so far as the United States has been concerned, has varied depending upon whether the permission were sought for tourist aircraft or for aircraft engaged in regular commercial transit. American tourist aircraft have had to meet certain definite requirements before they could enter the airspace of a foreign State. Permission has had to be especially negotiated through diplomatic procedures, and such permission has had to be secured in advance of actual flight. The necessity of securing permission has motivated in the direction of a close national in-

⁷L. B. Tribolet, "A Decade of American Air Policies," Air Law Review, IX (1938), 181-195.

⁸U.S. Department of State. Press Releases, Dec. 17, 1932. (Washington: Government Printing Office, 1932), p. 433.

⁹Note: The United States has entered into a number of bilateral agreements for the purpose of standardizing the requirements that must be met before aircraft may engage in international flight, and before aircraft may be sold and exported when intended for use entirely within a foreign State. This has been considered by W. M. Gibson, "United States Commitments on International Aerial Navigation," Air Law Review, IV (1933), 389.

spection of aircraft. This inspection has had to be undergone before the State would request a foreign State to admit aircraft registered by it, and before such aircraft has been permitted to leave the national territory. This has had the effect of a special national determination of the legitimate character of the trip and the airworthiness of the craft before it has been permitted to depart the national confines. With such an inspection chances for delay in the foreign State have been diminished greatly.

The steps that must be taken to secure permission for an American tourist plane to enter one of the Latin American States with whom the United States has had no general or special aviation agreement, have been summarized as follows:

The flier sends his application to the Department of Commerce; the Department of Commerce, after approving technical qualifications of flier and plane, notifies the Department of State of its approval; the Department of State instructs its representatives at the foreign capitals of the countries on the itinerary to request permission for the flight; permission is then requested from the Foreign Office in each of the countries.

The regular procedure dealing with such cases in the particular government concerned having been completed, the Foreign Office communicates the permission to the American mission, usually by note, and the American Minister (or Ambassador or Chargé d'Affaires) sends a despatch or telegram to the Secretary of State in Washington, stating simply that permission has been granted, or if necessary, adding qualifications or essential information. The Secretary of Commerce is then notified that permission for the flight has been granted by the governments named.

An official of the Department of Commerce thereupon sends the applicant his letter of authorization, which is to be carried always by the pilot during his flight abroad. It lists the date required in the application, and gives the date on which the authorization expires.¹⁰

If a foreign national, whose State has no special or general aviation agreement with the United States, wishes to engage in tourist flights into the United States, he is in turn forced to take up the matter with his State, and the long procedure has to be reversed.

¹⁰I. L. Thompson, "Flights Abroad and the Role of the Department of State," Journal of Air Law, IX (1938), 228.

This is true unless such State enters into a special agreement to the contrary. An example of this was the exchange of notes between the United States and Chile of August 18 and November 19, 1934. Under this agreement the fourth article of the Havana Convention was interpreted to permit private aircraft of both States to enter freely the territory of the other when engaged in pleasure or tourist voyages. Such transit was to be permitted without the need for securing formal authorization for each flight and was innocent passage, per se. However, under the terms of this agreement aircraft had to adhere to the regulations of the State through whose airspace it passed.

In his very interesting article Thompson has indicated by means of simulated correspondence the way in which a person secures permission to engage in tourist flights into another State.¹¹ This correspondence indicated the interrelationship that existed between the Department of State and the Department of Commerce in the process of granting permission for such tourist flights. There was a clear division of labor between the two.¹² It was the duty of the State Department to secure the necessary permission from the States in which the tourist wished to fly. It was the duty of the Commerce Department to determine if the national aircraft met the necessary requirements of airworthiness, if the pilot had attained the proper technical qualifications, and to learn if the flight would have the character of innocent passage. The whole matter was stated very succinctly by the same writer when he said:

The State Department, through diplomatic channels, secure permission from foreign governments for flights over their territories, where the United States has no air navigation agreements with the countries involved, or where the particular

¹¹Ibid., Appendix A, pp. 244-247.

¹²Note: Today the work of the Department of Commerce is in the hands of the Civil Aeronautics Authority.

conditions of the flight do not bring it under the terms of the agreements. Authorization for the flight is given the flier by the Department of Commerce after the necessary permission is secured.¹³

It should not be forgotten that these remarks have had reference to the situation in which the United States does not have an international air navigation agreement with the other State, be it due either to failure of such a State to ratify the Havana Convention or to the fact that no special agreement was ever negotiated between the States. Where such an agreement exists, and provided its terms permit it, it does not become necessary for the flier engaged in tourist travel to secure special permission from the government of the United States to engage in such travel.

The policy of the government of the United States with regard to flight into foreign States by American commercial airlines used to be quite the reverse of the policy concerning tourist flights. Under the American Foreign Air Mail Act of 1928 those American aircraft engaged in regular commercial international flights were required to make their own arrangements directly with the foreign States whose airspace the airlines wished to enter.¹⁴

¹³Ibid., p. 233.

¹⁴Note: Examples of this are numerous. Chile: "By decree No. 2001, of the Minister of War, authorization was given to the Pan American Grace Airways (Inc.), under certain conditions, to fly in Chilean territory, carrying passengers, mail and freight" (Chile, Diario Oficial [Santiago, July 5, 1929]). Ecuador: "By decree No. 118 the Executive authorized the Minister of Social Welfare and Labor to sign a contract with the Pan American Grace Airways (Inc.), under which that corporation will transport air mail into and out of the Republic" (Ecuador, Registro Oficial [Quito, September 2, 1929]). Colombia: "On November 4, 1929, the Colombian Ministry of War granted the Pan American Grace Airways permission to establish a commercial air service along the Pacific coast of the Republic" (Colombia, Diario Oficial [Bogota, November 12, 1929]; Bulletin of the Pan American Union, LXIV [1930], 82-83, 188-189). Since Brazil has not ratified any of the international conventions on aerial navigation "foreign aircraft, both amateur and tourist, may enter Brazil and fly over

These private and public negotiations culminated in agreements permitting regular commercial schedules to be followed, and permission was not required for each particular flight.

Under the Civil Aeronautics Act of 1938 the Government of the United States has changed its previous policy and now requires, with few exceptions, "a policy of having arrangements for any new international air service dealt with in agreements concluded between governments rather than between a private company and a foreign government."¹⁵ This does not mean that special permission must be negotiated through diplomatic channels for each specific trip, but means that the right to engage in international aerial transit depends upon an agreement between the governments to which the private air carriers owe allegiance. Following the national agreement, permission for undertaking the services is issued to the American air transit company by the foreign government. Similarly, the foreign air carrier must secure permission from the Civil Aeronautics Authority before it can regularly bring its planes and passengers into the United States. In this way air travel of an international character has been subjected to an extremely close surveillance.

So much for the actual procedural requirements for private aircraft engaging in international aerial transit. A public aircraft, and more particularly a military aircraft, is also forced to secure special permission before it can enter the airspace of a foreign State. The practice in regard to military aircraft seems national territory only under permit previously obtained from the Ministry of Communications and Public Works." "Civil Aeronautics in Brazil," Bulletin of the Pan American Union, LXX, (1936), 337. Thus, foreign companies engage in air commerce in Brazil only by special permission of the government, and such permission is granted only to lines engaged in international transit.

¹⁵Samuel E. Gates, "International Control of Aviation in Time of Peace," Journal of Air Law and Commerce, X (1939), 441.

to be that States, especially the American States, agree that special permission will be extended for moderately long periods, but that before a military aircraft may take advantage of such an agreement it must give advance notice of its intention, and of its contemplated itinerary in each instance.¹⁶ During the period of the flight of military aircraft, such aircraft are expected to adhere to the air navigation laws and regulations of each of the States in which it may be located.

From this brief survey of the conditions of international flight and the actual legal enactments and regulations that the aircraft must follow, it becomes clear that the privilege of innocent passage does not permit the liberty of action which the most serious advocates of international aerial traffic desire. On the other hand, States could hinder freedom of traffic to a greater extent than they now do if they should so desire. The national regulations are in the nature of a compromise between the desire to extend the privilege of international air traffic as widely as necessary for the purposes of political, economic, and cultural co-operation, without at the same time jeopardizing the national safety and best interests of the State.

2. The Influence of the Publicists

Following the Convention of Paris of 1919 and the acceptance of the limitative sovereign principle concerning the control of the airspace, statesmen, publicists, and air navigation experts began to realize that if States were to be satisfied with the principle of sovereignty, they must make the moral reservation that they would not unnecessarily and heedlessly impose hardships and senseless limitations upon innocent passage. Following the

¹⁶I. L. Thompson, *op. cit.*, p. 229; Robert E. Olds, "United States Flying Fortresses over the Andes," American Foreign Service Journal, XV (1938), 271 ff.

war many of those persons who had previously advocated the theory of freedom of the airspace transferred their allegiance to an advocacy of the greatest amount of freedom of innocent passage that could be permitted reasonably under the sovereignty principle. Their emphasis changed from a demand for completely free aerial transit to a wish that as few limitations to innocent passage would be raised as possible.

The general attitude that it was hoped would prevail in the matter of innocent passage was considered carefully in the various sessions of the International Law Association since 1919. The matter was very simply stated by Sir H. Erle Richards, Chichele professor of international law at Oxford, when at the Portsmouth session of the Association in 1920 he explained the high points of the Association's influence and activity as concerned the development of the principle of sovereign control of the airspace. He pointed out that the Association's air law committee had held that:

It is the right of every State to enact such prohibitions, restrictions and regulations as it may think proper in regard to the passage of aircraft through the air, because it is a sovereign State. But, they said, subject to this right of control, subject to the admission of sovereignty, we think that liberty of passage ought to be accorded to aircraft. That meant to say, it ought to be accorded just in the same way as liberty of passage by road is accorded.¹⁷

At the same session of the Association Hazeltime, one of the greatest exponents of the theory accepted in the 1919 Convention, made known his firm approval of the Paris agreement because not only was the principle of sovereignty accorded an unquestioned and firm legal basis, but also because the conduct of innocent passages was relegated to a "temporary and contractual right in

¹⁷Report of the Twenty-Ninth Conference of the International Law Association, Portsmouth, 1920, (London: Sweet and Maxwell, 1920), pp. 380-381.

the nature of a revocable license."¹⁸ Under this principle the various States were free to close their aerial frontiers by a legal process, and they were enabled to prevent the entry of undesirable foreign aircraft. So far as Hazeltine was concerned, the contractual, limited, and temporary right of foreign aircraft to move about over another State had nothing in common with the old corollary to the theory of freedom of transit, namely, a servitude of innocent passage. Such innocent passage was to be granted only as privilege, and not as an inherent right.

If Hazeltine were critical of the Convention of 1919 in any sense, it was because that Convention in no place in its original form specifically and expressly conferred upon foreign aircraft the right to land in another country. However, the Convention did contemplate landing, and as Hazeltine pointed out: "It may not be going too far to say that there is granted by the Convention an implied right to land, although, in general, the conditions of landing are left to be determined by municipal air law."¹⁹ He felt that while landing might not be inferred from innocent passage, that it could be derived from article eighteen which permitted transit with or without landing. Article twenty-four permitted aircraft to have various measures of assistance in forced landings. Article twenty-five permitted equal usage of aerodromes by national and foreign craft. These articles may be understood to mean that foreign aircraft engaging in international transit could land in another State when allowed innocent passage. Of course, there are certain instances in which aircraft may be forced to land, such being the case when aircraft has flown over prohibited areas as provided under article four of the Convention

¹⁸Ibid., p. 392.

¹⁹Ibid., p. 393.

of 1919.

As the restrictive force of the sovereignty principle came to be realized following its application after the World War, efforts were made to enlarge upon the principle of freedom of innocent passage in the hope that aerial commerce might expand as fully as its character warranted. On the other hand, there were latent fears that too much freedom would endanger the safety of the subjacent State. With these two conflicting attitudes struggling for a suitable compromise the International Law Association met at its regular session at The Hague in 1921. Upon this occasion the publicists present made generous plea for a more liberal interpretation of the idea of freedom of innocent passage.

In the hope that the privileges of freedom of innocent transit would not be taken advantage of, the committee on air law of the Association recommend that the Association place itself on record as favoring a change in the Paris Convention:

(2) Obligation to land. Add to 1st paragraph of Article 15: "The same obligation to land if so ordered to do shall apply equally to any aircraft, whether it be making a non-stop flight or not."²⁰

This recommendation proved entirely satisfactory to the Association.

One of the problems that related to freedom of innocent passage in 1921 dealt with flight across national boundaries at night. On the matter of twenty-four hour flying the committee suggested that aerial passage at night should be regulated by special agreements among the various States, and that these agreements should specify the conditions under which foreign airmen could fly at night over another State. In consequence the committee advocated that article two of the Convention of 1919, which

²⁰Report of the Ninteenth Conference of the International Law Association, The Hague, 1921, (London: Sweet and Maxwell, 1922), p. 335.

in its original form was not limited to day flying, be altered to read as follows:

Each contracting State undertakes in time of peace to accord freedom of innocent passage by day above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed.

Regulations made by a contracting State as to the admission over its territory to the aircraft of the other contracting States by day shall be applied without distinction of nationality.

Aerial passage by night is not permitted except by special agreement between the Governments of the contracting States respectively. The agreement shall specify conditions on which flying by night is permitted over the territory of the one contracting State by the nationals of the other contracting State.²¹

The construction and substantive content of this proposed amendment indicated the extremes to which the Association was willing to carry its principle of the sovereign control of the airspace. It also indicated the breadth of the principle and the degree to which it could be extended either for good or for evil.

Following the presentation of this suggested amendment relative to flight after dark, the Association discussed the merits and disadvantages of the proposition. Hofmannsthal thought that it would be better to standardize night signals than to forbid transit during this period. Perowne recognized the rights of States to limit transit at night, but wished that uniform regulations might be created to get rid of the special dangers of night flying not only to the aircraft, but also to the subjacent State from the point of view of espionage and general familiarity with night flying conditions. Such experience, it was thought, would prove useful in the case of smuggling or in eventual aerial warfare.

Arthur Jaffé, British lawyer, urged that the proposed amendment was aimed at permitting the States members of the CINA

²¹Ibid., p. 336.

to differentiate between the permission given to one State for night transit and another State. He said: "Any State can make special regulations to apply to all nationalities, flying either by night or by day. It was felt there must be some States who wish to differentiate between nationals of other countries; and that was the scope of the present amendment."²² C. R. Brigstocke of the British Air Ministry advanced a point of view that up to that time was not in accord with the spirit of the Association upon the matter of air transit. He stated that he thought "it would be wise for the International Law Association not to be the first to suggest military restrictions; let us grant to innocent air-traffic as much freedom as possible."²³ This point of view was important, for having created a system permitting the complete closing of aerial transit, there was a temptation to try to carry this principle too far.

The purpose of the resolution seemed to be to prohibit entirely night flying, and to permit it only by exception to the rule. In as much as night flying did not exist at that time, it was thought that the whole question was premature, and that the best procedure would be to await practical developments in aerial transit at night before setting any rules. This being the general consensus of opinion the aerial committee withdrew its recommendation, and the Association passed on to the discussion of other problems.

From 1921 down to 1930 the opinion of the Association became more crystallized than previously upon the need for the development of the principle of freedom of innocent passage. When the Association met in New York in 1930 it received a report sub-

²²Ibid., p. 344.

²³Ibid., p. 345.

mitted by Dr. Herman Döring, legal adviser to Lufthansa, entitled "Proposals for an International Air Navigation Convention."²⁴

The proposal submitted by Dr. Döring to the aerial committee of the Association, which was subsequently altered by both the committee and the conference, and which was directed toward the attainment of a satisfactory principle of innocent passage in a universal international convention, was as follows:

(2) Each contracting party, when not a belligerent, must accord freedom of innocent passage above its territory to the private aircraft of the other contracting parties provided that the conditions laid down by the Convention are complied with.²⁵

The committee of the Association before reporting this particular article to the Association altered the wording of the article to the effect that each contracting party "should undertake to accord freedom of innocent passage" above its territory to private aircraft of the other contracting parties provided that the conditions laid down by the Convention were complied with.²⁶ In the discussion that took place before the Association the suggestion made by Döring received hearty approval, and eventually the article was accepted by the Association when the words "when not a belligerent" were replaced by "in time of peace."

It was interesting that the resolutions adopted by the Association, formerly much concerned with the principle of the sovereign control of the airspace, should emphasize the need for freedom of innocent passage of private aircraft. Having once secured the limitative principle of air transit, the Association was coming to put more and more emphasis upon the need for free and un-

²⁴Report of the International Law Association, New York, 1930, (London: Sweet and Maxwell, 1931), 249-266; 424-456.

²⁵Ibid., p. 438; German text, p. 455.

²⁶Ibid., p. 254.

molested transit in the interest of better aerial relations. Major K. M. Beaumont of England was particularly interested that such a state of affairs should obtain. He referred to paragraph three of article fifteen of the Convention of 1919 which was concerned with the landing of foreign aircraft in another State. This clause had been interpreted narrowly by some States, and Major Beaumont pointed out that:

This restricted meaning, if substantiated, is likely to have the effect of limiting seriously the development of international air lines. It is suggested that very careful consideration should be given to the question of freedom of the air for all parties, including operators of regular lines, before any limitation of the general principle of freedom of the air is admitted.²⁷

Publicists on the whole have been cognizant of the need for getting rid of unnecessary limitations upon freedom of innocent passage.

The following writers, interested in the maximum attainment of the political, economic, and cultural goals permitted through international aviation, have criticized States for their failure to appreciate the real needs of freedom of innocent passage in international aerial transit: James W. Garner,²⁸ Maurice Bourquin,²⁹ Fernand de Visscher,³⁰ A. Cavaglieri,³¹ A. Henry-

²⁷Ibid., pp. 262-263.

²⁸"La réglementation internationale de la navigation Aérienne en Temps de paix," Revue de Droit international et de Legislation comparée, (1923), p. 374.

²⁹"L'Organisation Internationale des Voies de Communication," Recueil des Cours de l'Académie de Droit internationale, IV (1924), 200.

³⁰"Le Droit International de Communications," Zeitschrift für das Gesamte Luftrecht, II (1928), 8.

³¹"Règles Générales du Droit de la Paix," Recueil des Cours de l'Académie de Droit international, I (1929), 448.

Coffmannier,³² Albert Roper,³³ Jean Hostie,³⁴ L. H. Slotemaker,³⁵ A. de Lapradelle,³⁶ Woods Humphery,³⁷ A. Ambrosini,³⁸ Joseph Kroell,³⁹ and D. Goedhuis.⁴⁰ The real need today is that States should be enlightened enough to see the benefits accruing from the development of peace time international aviation. The way in which to secure this end in normal times is, as the various publicists have suggested, to permit the wider realization of freedom of innocent passage.

3. Demands of the Air Traffic Industry

The air traffic industry has been interested primarily in the extension of trade and commerce by means of international aerial transportation. Due to the active interest of such groups as the United States Chamber of Commerce and the International Chamber of Commerce, intensive efforts have been made to secure the innocent passage of aircraft engaged in international transit. The effort of these groups has been generally in the direction of minimizing national restrictions that tend to slow down or prevent

³²Eléments créateurs du Droit aérien, (Paris: 1929), pp. 144-145.

³³Op. cit., p. 194.

³⁴"Examen de Quelques Règles du Droit international dans le Domaine des Communications et du Transit," Recueil des Cours de l'Académie de Droit international, II (1932), 465.

³⁵Freedom of Passage for International Air Services, (Leiden: A. W. Sijthoff, 1932), p. 59.

³⁶Cours donné au Centre européen de la Dotation Carnegie, (Paris: 1933-34), p. 131.

³⁷A Review of Air Transport, (London: Institute of Transport, 1933).

³⁸"Souveraineté et trafic aérien international," Revue Aéronautique Internationale, VIII (1938), 130.

³⁹Traité de Droit international public aérien, op. cit., p. 178.

⁴⁰"Le Régime Juridique de l'Espace Aérien et le développe-

international aerial circulation. The work has very often been in the direction explained by John G. Lonsdale, who represented the committee on aeronautics of the United States Chamber of Commerce at the Washington Conference on International Civil Aeronautics in 1928, when he said: "Our Committee feels that the beginnings which have been made through various international conferences should be followed up and agreements be worked out covering regulations for clearance of aircraft, customs, immigration and health essential for the promotion of international aeronautics."⁴¹ Not only was innocent passage to be allowed, but, further, all unnecessary restrictions were to be obviated.

The attitude of the International Chamber of Commerce toward the development of the principle of freedom of innocent passage has been important in liberalizing the conditions of international air traffic. In attempting to bring pressure to bear so that barriers to air traffic might be eliminated, the International Chamber of Commerce has expressed itself in two ways. In the first place it has accomplished a great deal through its air law committee, and secondly, it has made its opinions known through the resolutions of its conferences.

The work of the International Chamber of Commerce in developing approval of the principle of innocent passage has followed a number of different lines. One of its efforts has been to secure the privilege of innocent passage for private and unscheduled aerial movements. The air law committee of the International Chamber of Commerce has devoted some time to the consideration of the use of aircraft as a taxi in international service rather than the

ment des lignes aériennes internationales," Revue Adronautique Internationale, VI (1936), 412.

⁴¹Papers of the Conference, op. cit., p. 591.

regularly scheduled and advertised services offered by well established airlines.

The development of the taxi or special trip aspect of air commerce has been an important phase of commercial aviation, but few States have made provision in their legislation for the conduct of such aircraft. The question was raised whether the aircraft engaged in taxi service must secure special permission from the countries of destination in order to permit transit above and landing within their area. Some States have passed such special legislation, and because the International Chamber of Commerce viewed such obstacles to the free development of international air commerce with alarm, its air law committee adopted a resolution upon this subject in its session of December 3, 1930. The resolution urged the various governments not to adopt rules that would hinder or make impossible international air services of a limited character. The committee was convinced of the importance of this form of commerce in the future, and it did not wish that commercial traffic of this special nature should have to have a particular authorization granted by the country of destination before landing would be permitted.

When the air transport committee of the International Chamber of Commerce met in Paris on the 23rd November 1932 with twenty-five experts representing both commercial airlines and international regulatory agencies present, it considered the problem of the barriers to freedom of innocent passage and the means of obviating them.⁴² The committee looked at existing conditions and also at various suggestions, which if adopted, might have impeded the extension of such limitative influences. The committee

⁴²Revue Aéronautique Internationale, II (1932), 451. This committee has met yearly in Paris since 1931.

stated that it thought that the internationalization of civil aviation would be a serious obstacle to the free development of commercial aviation, and to the development of international commerce. The committee set forth in great detail its objections to and criticism of the existing regulations that seemed to limit the full flowering of international aerial commerce.

Among the observations made by the committee was the demand for a complete freedom of transit unlimited by many existing regulations such as the multiplicity of unnecessary forbidden zones, which were often unneeded for purposes of national defense; the demand that the regulations concerning the use of special airplanes be liberalized in the interest of fast transport; the suggestion that fewer restrictions be imposed by national administrations upon the carrying of photographic apparatus and that such limitations be employed only when military interests were clearly at stake; and, finally, that the strict regulations concerning the transport of carrier pigeons by air be attenuated.⁴³

The committee further urged the consideration of a number of problems with which the League of Nations and the International Conferences of American States had been attempting to deal, namely, the realization of better ways to deal with the matter of import duties on aircraft and aircraft fuel, and with the technical matters of customs inspection and clearance. Other suggestions made by the Committee pointed out the discriminations levied against aircraft in the form of double taxation and the burdensome charges and taxes levied upon airports. In order to expedite the transit of persons by air the committee severely criticized the existing system of visas required of aerial travelers, and suggested that it should either be eliminated or simplified by the securing of

⁴³Ibid., pp. 451-2.

special stamps in their place, which might be purchased easily at travel offices without the interminable delay suffered at consular offices.⁴⁴

Three of the recommendations of the committee on the existing legal conditions of transit went directly to the source of much trouble. These three suggestions were to improve materially the condition of international aerial transit. In the first place, the committee recorded the dissatisfaction of commercial airways with the slowness of the various governments signatory to the Warsaw Convention of 1929 on International Air Transport to ratify the agreement which dealt with a uniform transport contract, and suggested that many advantages would accrue to the commercial companies if the liability of the carrier were governed by uniform regulations. Secondly, the committee advocated the need of uniform legislation governing the liability of aircraft operators toward third parties and urged the International Technical Committee of Aerial Legal Experts (CITEJA) and the International Conference on Private Air Law to establish such a convention as would encourage international aerial transit. In the third place, the committee stated the need of commercial airways to be free from distraint, and urged that an international agreement upon such questions as distraint, requisition, and guarantees be established.⁴⁵

Possibly the most striking of the suggestions made by the aerial committee of the International Chamber of Commerce and one having least success was a resolution advocating the liberalization of international aerial transit. This resolution was as follows:

⁴⁴Ibid., pp. 454-5.

⁴⁵Ibid., p. 454.

(1) That the establishment of international air lines should be free and should not in the future be subject to previous sanction from the State over which the lines pass; that article 15 of the Convention of 1919 should therefore be amended accordingly.

(2) That in any case and until article 15 of the Convention of 1919 has been amended, the right to make the establishment of international lines dependent upon previous sanction by the State over which the lines pass should only be exercised exceptionally.⁴⁶

Another important contribution to the development of the principle of freedom of innocent passage was made by the International Chamber of Commerce at its eighth Biennial Congress in Paris, 24th to 29th June, 1935. Delegates from forty States and many international organizations were present. At this session the following resolution dealing with the obviation of barriers to air navigation was passed:

While noting with satisfaction the remarkable technical progress recently accomplished by aviation, the International Chamber of Commerce regrets that, in the field of regulation, barriers to air navigation have tended to increase, thus preventing world trade from benefiting by all the advantages offered by the fastest means of transport at its disposal.

It recommends that the international conventions and national regulations be amended along more liberal lines, and urges the air transport companies to reach agreement among themselves with a view to bringing the different systems of air lines into harmony, due account being taken of the interests of the countries flown over.⁴⁷

With such pressure as this, States could be asked to realize those conditions of freedom of transit and economic betterment most in line with their need for security.

⁴⁶Ibid., p. 451; the Paris Convention, art. 15, paragraph 4 provided originally that "the establishment of international airways shall be subject to the consent of the States flown over." This was modified on June 15, 1929, and the modification, which became effective on May 17, 1933, provided: "Every contracting State may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory." Thus, the modification did not achieve the end desired by the International Chamber of Commerce.

⁴⁷Revue Aéronautique Internationale, V (1935), 279-282; International Chamber of Commerce. Resolutions Adopted by the Eighth Congress, Paris, 1935. Brochure No. 89, (Paris: 1935), p. 13.

When the Air Transport Committee of the International Chamber of Commerce met in Paris on February 27th, 1939, it made a notable contribution to the development of the freedom of aerial transit.⁴⁸ This session, presided over by Dr. K. Weigelt, director of the German Bank, and chairman of the committee, was attended by representatives of the Chamber from six States and their component parts. Four international organizations interested in the successful regulation of aerial traffic were also present. These were the League of Nations, the CINA, the CITEJA, and the International Air Traffic Association (IATA).

The conclusions of the committee were presented in the form of draft resolutions to the International Chamber. These resolutions dealt with the matter of innocent passage and such problems related to it as prohibited areas, abolition of passports and visas for the crews of air transport companies, air transport documents, and the Warsaw Convention.

The matter of freedom of innocent passage was unquestionably the most important of the matters discussed. In this respect the committee urged that the Vienna resolution of 1933 on freedom of aerial movement be given further consideration. This resolution had urged that article fifteen of the Paris Convention of 1919 be modified, and that only reasonable restrictions justifiable in the interest of public security, be imposed upon international air transit. The International Chamber of Commerce again urged, that until article fifteen of the Convention were altered, that the right to make the formation of international lines dependent upon the previous sanction of the State flown over should be exercised exceptionally.

In résumé it may be said that the International Chamber of

⁴⁸Revue Aéronautique Internationale, IX (1939), 11.

Commerce has sincerely attempted to get rid of the obstacles which have grown up around aerial transit by virtue of the acceptance of the theory that a State has sovereign control over its superjacent airspace. The Chamber has been particularly interested in the development of freer air transit facilities so that persons interested in finance, industry, and commerce might benefit from the inherent characteristic of speed that aircraft provides. The resolutions and recommendations have been of vital importance in getting national and international systems of government to develop an international law of the air. Because of its continued and vital interest in the problems of international transit by air, the International Chamber of Commerce has been one of the major motivating factors in the direction of the development of an international law of the air.

Since the main impetus for the development of a peace time international law of the air has come from economic interests, and since the International Chamber of Commerce has been the major representative of economic interests in the international field, its services as a prime mover in the development of an international law of the air and freer international transit have been of profound significance for the development of the international law of the air. Without the interest of the International Chamber of Commerce in international air law, its present character would have been vastly different.

4. Attitude of International Administrative Agencies

The various branches of the League of Nations interested in communications and transit, the CINA and the CAI have been among those who have been most seriously interested in the development of the principle of freedom of innocent passage. Their

interest has not been one of creating the principles so much as developing the principle and removing obstacles which thwart the freedom of international aerial movement. By their combined efforts, these agencies have developed international aerial transit with fewer restrictions than would otherwise have been the case.

The International Commission for Aerial Navigation has been one of the most effective of the international administrative agencies favoring freedom of innocent passage. It has had the duty of reconciling the two principles found in the first two articles of the Convention of 1919. The rights of the State emphasized in the first article and the needs of persons emphasized in the second have been juxtaposed, and the CINA has striven to assist both interests in the realization of legitimate goals.

The legal subcommittee of the CINA has been more actively concerned with the development of the law of the air than the other technical sub-committees of the Commission. In the meeting of the legal sub-committee in Paris from the 21st to the 23rd of February, 1935, serious consideration was given to several problems of importance.⁴⁹ A problem, vitally affecting aerial transit, was discussed by the sub-committee at this time. It dealt with the modification and interpretation of articles two and fifteen of the Convention of October 13, 1919. The main issue was whether States parties to the Convention that had once granted authorization for aircraft of foreign States to cross their territory could demand that foreign aircraft should secure a special and prior authorization before it was to be accorded this privilege.

The problem and the decision were set out by the sub-committee, when it reported to the CINA that no rule could be maintained to the effect that member States could make conditional

⁴⁹Op. cit., V (1935), 5.

upon a special and prior authorization flight over its territory by the aircraft of the other member States. The sub-committee thought that no such rule could be laid down because of the statement in the second paragraph of article two of the Convention to the effect that admission of foreign aircraft into the airspace of another State could not be based upon the distinction of nationality, and, secondly, that the first paragraph of article fifteen permitted the aircraft of contracting States to cross the airspace of another contracting State without landing. Therefore the legal sub-committee held that no rule upholding the right of granting special and prior authorization could be granted "even if the issue of the authorization in question is dependent only upon a simple formality."⁵⁰

After making this decision which upheld the principle of freedom of innocent passage by air, the legal sub-committee continued its opinion in such a way as to obviate not only its decision but also the first paragraph of the second article of the Convention. The committee's reversal of position was based upon a temporary and exceptional condition, as it phrased it, and read as follows:

Nevertheless, for reasons arising out of the particular situation of certain countries and in order to place these countries in a position to afford every facility to airmen, the Sub-Commission thought it would be expedient to admit, as a temporary and exceptional measure, that these countries may require prior notice from airmen who desire to fly over or land in their territory; it being understood that the time-limit for prior notice shall be reasonable and shall be fixed, by the State flown over, under such conditions as not to constitute a barrier to the normal exercise of air navigation.

States which adopt the rule of prior notice should notify the fact, with all necessary particulars to the I.C.A.N., which will communicate these decisions to all other contracting States.

The Sub-Commission decided also to suggest to the Commission that it recommend to the contracting States that only for imperative reasons should they avail themselves of the faculty

⁵⁰Ibid., p. 5.

accorded to them by the foregoing Resolution, as an undue extension of this exceptional rule would be liable to reduce very appreciably the air traffic facilities which it is its object to ensure to civil aircraft of all the contracting States.⁵¹

The legal sub-committee hoped that this interpretation would not limit severely the concept of freedom of innocent passage and actual international commercial air transit. The sub-committee expressed the desire that its proposition not be given the footing of a rule. Rather, it was to be employed sparingly and only under most unusual circumstances.

When the CINA met in its regular session in Brussels in June of 1935, it accepted in essence the recommendations of the legal sub-committee on the matter of a restrictive interpretation of articles two and fifteen of the Convention. Thus, the Commission recommended to the contracting States that they avail themselves of the faculty of requiring special and prior authorization before foreign aircraft could engage in international traffic above their territory, only under the most special and imperative circumstances. Even so, the resolution represented an unfortunate tendency.

The International Aeronautical Conference, a European international administrative organization interested in the development of a satisfactory law of the air, has been vitally concerned with the problem of freedom of innocent passage of aircraft, and in its numerous meetings has considered the best ways to secure the utmost freedom of aerial transit. At its session at The Hague of 23rd to 27th May, 1938, the CAI considered that aspect of freedom of innocent passage dealing with the flight of aircraft registered in one State over the territory of another State without landing therein. The International Aeronautical Conference went

⁵¹Ibid., p. 5.

on record as being opposed to the need for a special authorization before flight, from a foreign government, if such flight were to be over the territory of that State and was not to include a landing of the foreign aircraft in the second State. The resolution of the Conference was as follows:

La Conference, constatant qu'aux termes de l'Article 15 de la Convention portant réglementation de la navigation aérienne en date du 13 octobre 1919 les itinéraires susceptibles d'être imposés pour les survols sans atterrissages doivent l'être d'une façon générale et non pas dans chaque cas particulier; que toute prescription exigeant une autorisation spéciale pour le survol du territoire sans atterrissage est contraire aux dispositions de la C.I.N.A.; prend acte de la déclaration de la Delegation allemande que son pays est prêt à supprimer les prescriptions à ce sujet, si cette attitude est adoptée par tous Etats avec les-queles il a conclu des conventions.⁵²

The Conference stated the rules applicable to international flights engaged in by aircraft other than regular airlines. These aircraft were known as taxi aircraft and were engaged in cabotage. The International Aeronautical Conference recalled that under the terms of international conventions, the international flight of such taxi craft, when for remuneration, was to be permitted, and such craft was not to be subjected to the requirement of securing special authorization.⁵³

The regulation of the transport of photographic apparatus in international flight was the subject of a resolution. Therein it was stated that such apparatus, if kept in a passenger's baggage, and not taken out during flight was not subject to being sealed for the period of flight. If such were not the location of the apparatus, it was to be subject to being sealed, and such fact was to be certified to by the proper authorities in the carnet

⁵²Op. cit., VIII (1938), 219.

⁵³Ibid., p. 219.

de route.⁵⁴ The purpose behind this regulation was to permit aircraft to adhere to swifter schedules. It was thought that such faster transit might be secured if the procedures on the ground during stops were cut down to a bare minimum.

The International Aeronautical Conference made an exception to the general prohibition on the carriage of firearms in aircraft engaged in international flight. The Conference decided that for the future a request to carry firearms need not be made if the following conditions could be met: first, the arms were to be of a personal nature and destined to be used for personal defense or in hunting; second, there was to be a prohibition against the taking of more than two firearms by any single traveler by air; third, the number of bullets for each gun was not to exceed fifty; fourth, before the departure of the aircraft the arms were to be sealed at the airport of departure by the proper authorities; and, fifth, the carriage of such arms and munitions was to be stated in the carnet de route with an indication as to the number and character of the guns and loads.⁵⁵

The International Aeronautical Conference also presented an interesting suggestion concerning forbidden zones. This recommendation indicated the real desire of the body to get rid of all unnecessary restrictions on the free development of international aerial transit. The Conference stated: "With the view of safeguarding the interests of aerial traffic, the Conference recommends the universal supplementation of permanent forbidden zones, which exist actually and to renounce the creation of new forbidden areas".⁵⁶ Such a liberal attitude as this would certainly permit of freer

⁵⁴Ibid., p. 220.

⁵⁵Ibid., p. 220.

⁵⁶Ibid., p. 220.

international circulation, and would, while recognizing the principle of the sovereign control over airspace, permit the greatest possible amount of freedom in the development of the concept of freedom of innocent passage.

The League of Nations has considered the problem of aerial transit in many of its constituent bodies. Aerial transit has been dealt with by the Conferences on Communications and Transit held under League sponsorship, by the air commission of the Disarmament Conferences, by the Advisory and Technical Committee for Communications and Transit, by the Air Transport Cooperation Committee, and by both the Assembly and the Council.⁵⁷ It will be my purpose to deal particularly with the contributions to freer international aerial transit made by the Conferences on Communications and Transit, the sessions of the Advisory and Technical Committee for Communications and Transit, and the work of the Air Transport Cooperation Committee. It has been the primary aim of these three League bodies to establish conditions conducive to freer and better international aerial transit. Their technique has been the careful study by experts of existing air transit conditions, the formation of resolutions, and the drafting of conventions.

Transit by air in international law has been materially affected by the activity of the international conferences on freedom of communications held under the auspices of the League of Nations. The first of these Conferences, held in Barcelona in 1921, while not referring to international air transit in specific terms, did draft a Statute which was applicable to air transit and which has had a material influence upon the development of the

⁵⁷ Edmond Pittard, "L'Aéronautique et la Société des Nations," Rivista di Diritto Aeronautico, (April, 1932), pp. 149-154.

international law of the air. This Statute on Freedom of Transit included in its definition of traffic in transit, goods and baggage that were moved by persons, vessels, coaching and goods stock and "other means of transport."⁵⁸ The latter term, was employed in a number of other articles in the Statute, and must be interpreted to include aircraft. Goods in aircraft, then, are in transit across a State when "the passage across such territory, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey, beginning and terminating beyond the frontier of the State across whose territory the transit takes place."⁵⁹

This Statute, whether intentionally or not, supplemented the Convention Relating to the Regulation of Aerial Navigation of 1919, concerning freedom of innocent passage in international air navigation. This is of some importance when one finds in article two of the Statute the statement that international transit, across both territory and territorial waters, should not be handicapped by drawing distinctions based upon "the nationality of persons, the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods or of vessels, coaching or goods stock or other means of transport."⁶⁰ The portion of this phrase that applied to aerial transport was the term other means of transport. If no distinction were to be made between aircraft, maritime vessels, and railways, for example, and if ships and trains were permitted to pass freely through the territorial waters and territory of a State, then the

⁵⁸League of Nations. Barcelona Conference on Freedom of Communication and Transit, 1921, Verbatim Reports and Texts relating to the Convention on Freedom of Transit, (Geneva: League of Nations, 1921), p. 310.

⁵⁹Ibid.; p. 310.

⁶⁰Ibid.; p. 310.

same reasoning would seem to permit other means of transport, namely, aircraft, to claim the same rights and privileges. Hence, no distinction not placed upon transportation by ship or rail was to be placed upon aircraft, and no discriminations were to be made that were based upon the nationality of persons, flag of vessels, place of origin, departure, entry, exit, or destination, or ownership of the means of transit.

Article four of the Statute restated the principle of innocent passage found in the previous articles, in the sense that innocent passage meant a form of treatment in which all types of traffic were to be encouraged by not having discriminatory hardships placed upon them. Thus, the Statute attempted to aid the innocent passage of aircraft when it provided: "No charges, facilities or restrictions shall depend, directly or indirectly, on the nationality or ownership of the vessel or other means of transport on which any part of the complete journey has been or is to be accomplished."⁶¹ This phrase was contrary to the original provision in the 1919 Convention in so far as the latter made the transit of aircraft depend upon the nationality of the owner of aircraft and forbade the free transit in international navigation of aircraft possessing a nationality or registration of a State other than that of the owner's nationality.

Reconciliation of the 1919 Convention with the 1921 Statute in this respect would call for legal and logical gymnastics. However later articles established five conditions under which the Statute operated; any one of which might be used reasonably to support the contention that the Statute yielded to the Paris Convention of 1919, and in fact, to all previous conventions binding the parties.

⁶¹Ibid., p. 311.

In the first place, article five insured that the Statute be subordinate to the air navigation Convention of 1919 and other treaties when it provided that:

Nothing in this Statute shall affect the measures which one of the Contracting States may feel called upon to take in pursuance of general international Conventions to which it is a party, or which may be included hereafter, particularly Conventions concluded under the auspices of the League of Nations, relating to...transit...⁶²

In the second place, the scope of the Statute in providing for freedom of transit by aircraft was limited by a portion of article six which provided:

This Statute does not of itself impose on any of the Contracting States a fresh obligation to grant freedom of transit to the nationals and their baggage, or to the flag of a non-Contracting State, nor to coaching and goods stock or other means of transport coming from or entering from, or leaving by or destined for a non-Contracting State, except when a valid reason is shown for such transit by one of the other Contracting States concerned.⁶³

Thirdly, article seven provided that:

The measures of a general or particular character which a Contracting State is obliged to take in case of an emergency affecting the safety of the State or the vital interests of the country may in exceptional cases, and for as short a period as possible, involve a deviation from the provisions of the above articles; it being understood that the principle of freedom of transit must be observed to the utmost possible extent.⁶⁴

Fourthly, article ten of the Statute provided that "The coming into force of this Statute will not abrogate treaties, conventions and agreements on questions of transit concluded by Contracting States before May 1st, 1921."⁶⁵ However, in view of this concession the signatory States to the Statute agreed that in the future and upon the termination or alteration of conventions on

⁶²Ibid., p. 311.

⁶³Ibid., p. 311.

⁶⁴Ibid., p. 311.

⁶⁵Ibid., p. 312.

transit that were opposed to the principle of the Statute, there would be modification of the undesirable provisions, and the newly agreed upon conventions were to be in harmony with the principle of freedom of transit and consequently innocent passage to the extent that national geographical, economic, and technical conditions would permit.

Lastly, the delegates to the Barcelona Conference limited the full application of this Convention as concerned previous treaties by providing in article twelve that:

In conformity with article 23 (e) of the Covenant of the League of Nations, any Contracting State which can establish a good case against the application of any provision of this Statute in some or all of its territory on the ground of the grave economic situation arising out of the acts of devastation perpetrated on its soil during the war 1914-1918, shall be deemed to be relieved temporarily of the obligation arising from the application of such provision, it being understood that the principle of freedom of transit must be observed to the utmost possible extent.⁶⁶

Thus, while advocating the general application of the theory of freedom of transit, the Statute was so limited that under certain trying circumstances, its strict interpretation might be lifted.

The Statute in essence attempted to reconcile the economic need of freedom of transit by various means of transport, including aircraft, with the sovereign right of a State to prevent the entry within its space of persons, goods, or objects which would threaten the welfare or security of the State if admitted. It was actually the same problem that had faced the early theorists in international air law when they strove so desperately to find a working arrangement that would serve as an acceptable compromise between the freedom of the air theory and that of the sovereign control of the airspace. In more refined terms it was an effort to designate what action would be permitted under the heading of

⁶⁶Ibid., p. 312.

innocent or inoffensive passage or freedom of transit and of action that should not be allowed. While in effect the Statute advanced the theory of complete freedom of transit, in practice limitations were specified, which upheld fully the rules and regulations established in previous international conventions.

This Statute like the International Convention Relating to the Regulation of Aerial Navigation of 1919 was intended to be applicable particularly in time of peace. However, article eight of the Statute indicated that it was to continue in effect in time of war in so far as the rights and duties of belligerents and neutrals were known and admitted.

The importance of this Statute, so far as international aerial navigation was concerned, was to assimilate it in certain respects to other forms of transit. It did not, however, provide for detailed regulation of the technical aspects of transit. The focus of the entire Statute was upon the development of a greater freedom of movement, so that political and economic international relationships might be improved and extended. Not only was the concept of freedom of transit stated in positive terms, but the idea was popularized that freedom of transit was essential to a more perfect international regime. Freedom of innocent aerial navigation has tended to develop from the acceptance of the principle of freer international transit in general.

The Air Transport Cooperation Committee of the League of Nations was constituted primarily to determine what means were necessary to secure a greater degree of freedom of aerial transit and the corresponding freedom of innocent passage. When the Committee met in Geneva from July 8th to 12, 1930, it was concerned with the need for ensuring the best development of air navigation. In order to secure such results, it proceeded to a discussion of four major problems. These were the process of admitting foreign

companies engaged in regular international aerial transportation into the territory of other States, the progress of international cooperation in the development of lines of aerial navigation, the eventual study of a special statute applicable to certain international relations of a general interest, and the possibility of giving some practical assistance to international airlines.

The Air Transport Cooperation Committee placed its recommendations and considerations on these four matters before the Advisory and Technical Committee on Communications and Transit. The latter, after carefully considering the report of the Air Transport Committee, adopted resolutions relating to the matters presented to it. These resolutions dealt with the four problems enumerated above, and in them the Advisory and Technical Committee approved the suggestions made by the Air Transport Committee.⁶⁷

The Advisory and Technical Committee on Communications and Transit at its fifteenth session in Geneva in 1930 urged certain resolutions on the question of international aerial commerce. The Committee was motivated in its resolutions by the feeling that it was no longer possible to distinguish between aerial transportation taking place over land areas and such flight taking place only over the high seas, territorial waters, or using hydro-aerodromes. In other words, all aerial transit and transport, regardless of where it took place, was to be subject to a certain minimum standard of uniformity. With this in mind the Committee, upon the proposal of the special Committee, adopted the following two resolutions: first, that the governments invite various international organizations to study the means of giving to regular international aerial transport more liberties than they were receiving at that time; and, second, that the various governments take a benevo-

⁶⁷Revue Aéronautique Internationale, I (1931), 55.

lent view of requests made to them by regular international airlines for permission to fly over their territory, and, further, that the States conclude some form of an agreement with as liberal terms as possible to the end that air transit companies might carry on international commerce freely. The Committee also urged that the air companies themselves try to establish such friendly relations as possible with the aeronautic authorities of the foreign States flown over.⁶⁸

An objection to liberalizing freedom of passage across State frontiers, especially when a small State was to be flown over, and no landing was to be made therein, was raised before the Advisory and Technical Committee by Dr. H. Grünsbaum of Austria in 1930. His work with the CINA had made him aware that certain States, mostly small ones, had adhered to the Convention of 1919 with the reservation that flights over their territory without landing would depend upon their consent. They feared that if the preliminary consent of small States were not made essential before a trans-country flight were made, then these countries would find their airspaces swarming with aircraft of regular lines which would cross their territories without landing.

The secretary-general of the Committee, Mr. Haas, replied that when the resolution had been accepted by the Air Transport Cooperation Committee, that this body had not thought that the resolution would go so far as to tend "to suppress the authorization to fly over territories without stoppage; it merely asked that greater liberty should be granted to aircraft belonging to regular air navigation lines."⁶⁹ The secretary-general indicated

⁶⁸Ibid., p. 55.

⁶⁹League of Nations, Advisory and Technical Committee for Communications and Transit (Geneva: League of Nations, 1930), C. 663. M. 276. 1930.VIII; VIII Transit 1930. VIII. 15, p. 18.

that if the text were to be interpreted as giving a complete freedom of transit, just as if the airspace were free across small States, then that interpretation was wrong. The text permitted of a compromise between two extremes of freedom and sovereign control. As Haas said:

It made it possible for those who had declared themselves in favor of the authorization of transit without stoppage to consider the right of each State to accept this as a matter of fact, and for the others to hope to see, not the authorization of transit without stoppage suppressed, but a wider liberty granted to machines of the regular air navigation companies, and States receiving favorably requests for authorization to fly over their territory.⁷⁰

This explanation proved to be satisfactory to the delegates attending the session of the Advisory and Technical Committee, and consequently they adopted a resolution upon the proposal submitted by the Air Transport Cooperation Committee. It was thought that in as much as no distinction had been made in the various international conventions that constituted international air law between the operation of regular air lines, local traffic or cabotage, transport effected with loading or discharging in the territory in question, transit with landing for supplies, and transit without landing, that one should take into consideration these various kinds of transit in modifying the rules applicable to them.

In order to regulate more adequately the specialized forms of air traffic that had developed since 1919, the Committee on Communications and Transit passed the following resolution upon the conditions for the admission of foreign companies engaged in regular international transport by air:

The Committee considers it desirable:

(1) That the Governments should request the competent international organizations to find the means of affording greater freedom than is at present enjoyed by regular international air transport;

⁷⁰Ibid., pp. 18-19.

(2) That henceforth:

(a) The Governments should examine in the most liberal spirit requests for authorization to fly over their territories submitted to them for the purpose of regular transport by air;

(b) The Governments should endeavor to conclude among themselves agreements granting the most favorable treatment possible to regular international air transport.

The Committee further considers it desirable that air navigation undertakings carrying on services in territories other than the national territory should maintain relations of cordial co-operation with the national air organizations of the countries flown over with a view to ensuring the greatest possible efficiency of the international service.⁷¹

Aircraft is essentially international and its service of speed in transit would be decreased measurably if regular air lines were forced to land in all States in Europe en route from one definite starting point to another destination.

The Committee then proceeded to a discussion of a statute that might be applied to such international air navigation enterprises as were operated between continents regardless of whether such services were carried on by a system of pools or by an internationalization of the lines. When this topic was under discussion, the secretary-general of the Committee made an extremely interesting observation on the general question of freedom of international aerial movement. He spoke for others and without approving or disapproving the contention, but he said:

Some people had considered that the question of the authorization of transit without stoppage ought not to arise for lines of this kind, for a country should not be able to prevent the establishment of a line in the general interests by its refusal to authorize aircraft to fly over its territory.⁷²

In this phrase were raised many problems not only applicable to international and inter-continental aerial relations, but also to the concept of better international relations in general. To what extent would the higher public interest of international and long distance aerial transit be permitted to override a claim by a State

⁷¹Ibid., p. 63.

⁷²Ibid., p. 20

to the sovereign control of its airspace? With the principle of the 1919 Convention firmly imbedded, it would seem that if the State were the judge of last resort, that the transit might well be forbidden or prohibited. However, in view of all of the suggestions, recommendations, and resolutions that have been made favoring the establishment of a freer system of international aerial transit, based in large part upon a more liberal interpretation of concept of freedom of innocent passage, a condition has been brought about gradually in which less restricted flight might be secured.

The action of the various administrative bodies, directed to the same end as that advocated by the various commercial associations, has been the direct way of achieving a more liberal system of international flight. The administrative bodies have used all of their powers to this end, and their recommendations and other expressions of opinion have sought to impress upon national States the need for freedom of innocent passage. However, no more than a compromise has been realized in this direction. States have shown no inclination, to permit a freedom of aerial transit that would endanger their own conception of national interests, whether considered from the point of view of national defense, or of the monopolistic exploitation of its position or resources. The solution best in keeping with the actual peace time needs of the community of nations is and must continue to be a liberal interpretation of the principle of freedom of innocent passage, and innocent passage must be restricted to such international aerial transit as would secure the best interests of States without at the same time putting them in fear or apprehension of harm or discrimination.

CHAPTER IX

CONCLUSION

The development and growth of international aerial transit since the turn of the century is a fascinating story. It has been a story of adventure and of fearlessness based upon the magnificent technological achievements of men of inventive genius in the field of aircraft construction. Men of courage made use of the material development of aviation itself to indicate its possible use in covering long distances rapidly. As early as 1908 Wilbur Wright had flown a distance of 77.5 miles. In 1910 Farman flew 145 miles. In 1910 Tubutea increased the record to 363 miles in a Farman plane. In the following year Gobe had flown a non-stop record of 460 miles and in 1912 Fourny had raised the mileage to 628 miles. In 1913 Perreyon attained the height of 19,600 feet.

The year 1919 brought the first trans-Atlantic flight from St. Johns, Newfoundland to Ireland by Alcock and Brown of 1,936 miles, and 1922 and 1923 saw flights by Kelly and Macready across the continental United States, with the first flight totaling 2,060 miles and the second over 2,500 miles. Similar long distance and non-stop flights had been made in all the corners of the globe by 1924.

Aside from these material accomplishments aviation has been able to depend upon significant bonds to indicate its worth in international aerial navigation. Such aeronautical relations have been assured because of the conviction that transit through the air was a way in which to further many necessary relationships between States.

International aviation has evolved and unfolded as a means of serving our complex and economically organized society. But aviation has become more than a service to the needs and whims of various peoples. It has had the potentiality of becoming a new symbol of international accord; a new messenger of better international relations; a means of uniting States into a coherent area of good understanding based upon a sympathetic discernment and comprehension of those fundamental elements of comity known as good neighborliness.

While aircraft and aviation have been prime factors in helping realize our shrinking world, on the other hand aircraft, because of its unlimited capacity as an agent of destruction has actually been a factor in helping the world to divide against its more natural tendencies. These propensities of aircraft were seen as early as the Second Pan American Scientific Congress by Alberto Santos-Dumont, the great Brazilian pioneer in aviation, when in speaking of inter-American aviation, he said:

I believe the modern improved aeroplane will solve the problems with which we have struggled for years. I believe the aeroplane will knit the various States of the continent into an integrally united, cooperating, and friendly combination, allied for their own wellbeing in trade and commerce, as well as for strength in times of possible war.¹

Thus, international aviation deserves to be studied because of the fundamental changes that it has brought about in the habit of thought of all persons, and because of its fundamental importance in promoting international understanding. As an instrument to be used in time of peace its potentialities and capabilities for good are almost unlimited. If international aviation in itself is a subject entitled to high consideration, one may also add that its legal and juridical aspects are worthy of some study and deliberation.

¹Bulletin of the Pan American Union, XLIII (1916), 208.

The demand for international aviation has been furthered by the fact that populations are expanding, large modern cities are coming into being, important industries are making their appearance, and due to technological inventions and improvements people have become conscious to the multiple interrelationships existing among the various States. The wants of these large aggregates of population often press for immediate satisfaction, and more than ever before, they have come to demand quick communication and transportation facilities. Aircraft is the only means yet created to satisfy the demand for such services whether it be the carrying of passengers, freight, or mail.

The point is sufficiently clear that international aerial transit had developed to such a vast scale that its proper conduct is extremely important. In order that international aviation be regularized and stabilized, and made as certain and secure as possible, there have been developed, and there are at the present time developing, standards or norms of conduct to which States, persons, and aircraft must adhere. Certain ideas of the right conduct for aircraft in international commerce have become permanent, and have become solidified into rules. These rules, developed by various means and procedures, may be referred to as an international law of the air.

In this conclusion I need only recall that numerous forms of procedure and substantial rules have become sufficiently fixed, and have been accepted by States, as to be included in the international law of the air. At this point it may be proper to summarize the ways in which this law of the air has been developed, and what are the sources of a law which is still in its early stages. I am concerned now with the means of development rather than the content of the law.

The major unofficial contributions to growth of an international law of the air were made by the Institut de Droit International and by the International Law Association. The former, beginning as early as 1902, under the leadership of Paul Fauchille, at a time when aviation was at a less advanced position than the legal thought on the matter, urged the application of the maritime law principle of freedom of the seas to the law of the air. The Institut accepted this theory, but changed it at later times to the concept of freedom of the airspace, and finally to the idea of freedom of aerial navigation limited by the State's right to its own self-protection and continued independent existence. The State was to be accorded the right to employ any necessary steps to maintain such a position. The International Law Association on the contrary maintained the need for accepting the principle of sovereign control of the airspace. With the realization of the extent to which aircraft might be used in international transit, which went hand in hand with the technological improvement of aircraft, plus the acceptance of this principle in various national laws, and further because of the war psychology that inspired the Paris Convention of 1919, the sovereignty principle was accepted.

The sources of international law, according to the statute of the Permanent Court of International Justice, include international conventions, general and particular; international custom, the general principles of law recognized by civilized nations, judicial decisions, and the teachings of publicists. Because of the recentness of the development of a law of the air one is not able to refer to all of these sources as bases for international air law.

The sources of international air law seem to be, first,

the conclusions arrived at by formal conferences of States that have resulted in the formulation of treaties, conventions, and technical agreements as well as formal resolutions and recommendations of an unofficial and nonbinding character. Various international conferences have engaged in discussions that have evolved into recommendations and draft conventions. These have indicated a fullfledged realization of the necessity for the existence of international standards governing the conduct of international aerial transit. Discussions by conferences of the latter type while not becoming a part of the formal international law of the air, were factors in forming international public opinion and practice, and so were on the threshold of international air law.

The second source consists in the informal contributions of aviation enthusiasts and formed the basis for developing custom and practice on various problems connected with international aerial navigation. The activities of such groups has been of some importance, especially in the determination of the rules of the road.

In the third place there have been the national laws and rules and regulations that have sprung up both before and after the framing of an international accord, and which must often put into local effect the important decisions taken by the international conferences. Municipal rules and regulations have played a large part in the actual construction of an international law of the air. With regard to the national bases for the enlargement of international air law, Bouvé has written.

There is another feature, significant from the standpoint of the extent to which general rules of national conduct with respect to air navigation may be said to be in the process of crystallizing into international law. I refer to State legislation on the subject independent of treaty. Of course such legislation is not international law or even evidence of it. But the fact that practically all civilized States

the world over are enacting domestic legislation covering air navigation over their territories is evidence of the extent to which public opinion--which comprises the mental attitude of all State governments--has accepted the principle of air sovereignty. But inasmuch as practically no legislation on the subject is to be found which does not contemplate and provide for the use of aerial domain of the legislating State in times of peace by foreigners in the act of innocent passage, and since the legislating State is bound in turn to expect freedom of innocent passage for such of its airmen as leave its air dominions in aerial flight, it follows that State air legislation must, even apart from treaty stipulations on the subject, work toward the establishment of rules under which international air navigation may be conducted. Establishment of such rules means stabilization; and stabilization of such rules between nations means international recognition by the family of nations, which means international law.²

Fourthly, there have been numerous articles and learned discussions upon the relationships between various aspects of international air law and the general and universal principles of the law of nations. Many publicists and jurists have written penetrating volumes and shorter articles dealing with the law of aviation. The commentaries of such individuals have given much of the direction to an expanding law of the air.

Fifthly, the various administrative bodies that have grown up to deal with aerial navigation have been contributors to the development of a law of the air. The principles of air law have been stated in major conventions. The administrative agencies have filled in the details. Their technical regulations, emanating from a central international authority, and applied equally and uniformly to all member States, have had the force of law. Included in this category are the resolutions or orders of such bodies as the International Commission for Air Navigation, the International Aeronautical Conference, and the League of Nations. The functions of these bodies have been both legislative and administrative. They have formulated and applied the law. The CINA has judicial functions, but this organization, whose powers

²Papers of the Conference, p. 507.

flow from contractual arrangements among independent States, has had no real opportunity to use its adjudicative power.

Sixthly, such court decisions as exist on the law of the air have rarely been decisions by international courts or administrative agencies. Rather they have been the opinions of national courts in applying various provisions of an international convention when such conventions were incorporated in the municipal law of the State.

These then have been the means of developing an international law of the air. They constitute the procedures for realizing the always difficult first steps in setting into motion a new idea. The effort was to secure better international relations through the ordering of international flight. The means was to be an international law of the air. The law desired to assure certainty and definiteness rather than arbitrariness and indefiniteness to the benefit of those multiple relations served by air transit.

The means of developing a law of the air have been surveyed in rapid fashion. It now becomes necessary to summarize the content of the law of the air as it is today. Since this volume has been concerned with public air law, reference will be confined to such matters as a State's sovereign control over the airspace, freedom of innocent passage, registration of aircraft, acceptability of uniform certificates of airworthiness, issuance of licenses to pilots, customs procedures, and all the other problems in which States are either the subjects of the law or are immediately involved.

The major matters with which public air law is concerned do not vary greatly from the twelve principles considered by the Aeronautical Commission of the Peace Conference in 1919. Despite

the changes made in the rapidity of aerial movement as influenced by technological improvement, the major issues continue to be the reconcilliation of the principle of sovereign control and limited aerial movement with the principle of freedom of innocent passage and unrestricted aerial transit.

The twelve principles of 1919 dealt with five general problems. First, there was concern for the regulation of aerial transit in international commerce. Secondly, there was reference to the protection of persons and property being transported through the air. Thirdly, there was the desire that aircraft should be assured of all necessary conveniences to expedite and make its journey in safety. Fourthly, there was an effort to obviate discriminations that might become barriers to air traffic. Lastly, there was provision for a permanent administrative organization for the purpose of detailed regulation of air navigation.

The detailed statement of principles by the Aeronautic Commission, which still constitutes the major portion of public air law, provided in the first place for the recognition of the principle of full and absolute sovereignty of each State over the air above its territories and territorial waters, with the understanding that this principle carried with it the right for States to exclude foreign aircraft. The State's right of sovereignty included the right to impose its jurisdiction over the air above its territory and territorial waters.

The second principle that has been carried over into the law of the air, and with ever increasing vigor, has been the provision relating to the right of innocent passage. This right, which was in the nature of a temporary and contractual right and comparable to a revocable license, was made subject to the principle of sovereignty, and was made to depend upon the security of

the subjacent State. This principle had been limited in Conventions and in national legislation by the reservation that States might enforce reasonable regulations relative to the admission of the foreign aircraft of contracting States.

The third principle provided that there should be no discrimination against aircraft applied upon the ground of nationality. The fourth principle dealt with the need for every aircraft to possess the nationality of a contracting State, that such aircraft should be entered upon the register of a contracting State, and that such registration would confer nationality.

The fifth main principle dealt with the maintenance of aircraft in a condition of safety, and provided for the existence of compulsory certificates of airworthiness, licenses for wireless equipment, certificates of competency for pilots and members of the crew, and the mutual recognition among the various contracting States of such documents. This article also provided for the establishment of international rules of the air, including international rules as to signals, lights, and regulations on collisions.

The sixth principle recognized the right of military, naval, and State aircraft when in the government service to certain privileges and exemptions not accorded to ordinary private aircraft. The seventh principle dealt with the recognition of a right of transit without landing on the part of aircraft when it was engaged in regular international commerce. This rule applied to international traffic between two points outside the territory of a contracting State, subject to the right of the State traversed to reserve to itself its own internal commercial aerial traffic and to compel landing of any aircraft flying over it by the showing of appropriate signals.

The Aeronautical Commission's eighth principle, and it has

been carried into the effective international law of the air, dealt with the right of aircraft of the various contracting States to make use of public airdromes in other States. There was to be no discrimination between national and non-national aircraft, and charges for landing facilities were to be applied equally. Ninthly, it was decided, and so it has developed, that there should be a mutual indemnity between the contracting States to cover damage done to a person or property in one State by government aircraft of another State.

The tenth principle provided for the well known CINA. The eleventh involved a recognition of the obligation of each State to give effect to the provisions of the Convention by its domestic legislation, while the last principle made the Convention applicable only in time of peace, and because of this impetus, the law of the air as it exists today applies entirely to the peace time aspects of aerial navigation. The international law applicable to aviation in time of war is extremely fragmentary, and honest doubts may be raised to its application.

Such then has been the form and content of the international law of the air as it has developed to the present. What will be the direction of international air law in the future?

One may suggest at least five tendencies, provided the results of the present war do not radically alter the trend. If the post-war trends are consistent with the pre-war tendencies, the following results seem assured. In the first place, while it may be too much to say that the principle of sovereign control of the airspace is a temporary stage in the development of a true law of the air, and that the law of the future will permit of a common and equal right of all peoples to free international aerial transit, yet it is unquestionably true that the future will see a

definite effort to simplify restrictions upon air traffic. Popular interest will be in favor of demanding the utmost freedom of innocent passage, and States will be obliged to permit aerial traffic above their territory to private aircraft that is able to meet definitely known minimum standards of conduct.

Secondly, the principle of universality may be achieved more closely than at the present. Aviation is primarily international, rather than regional or continental in character, and once the world returns to more normal days a uniform and universal international convention may be realized. The major conventions of the present day might be unified, a single administrative agency established, and the bilateral agreements, which are large in number and diverse in character, may be centralized or made unnecessary.

Thirdly, the future and more mature law of the air will divorce itself in many respects from maritime law from which it has borrowed so heavily. It will not continue its borrowing, for international air law has developed a unique and novel personality of its own, and maritime analogies are no longer able to satisfy the independent and special needs of international aerial transit.

Fourthly, it is probable that efforts in two directions will achieve satisfactory results. There will be continued attempts to destroy unnecessary barriers to air transit that have existed in the form of high customs, unwieldy port formalities, and antiquated regulations on attachment and seizure of aircraft. On the constructive side there will continue to be provision for such conveniences to aerial movement as radio on board aircraft, meteorological information, radio and electric beacons, and unification of aerial maps. Such action will undoubtedly inspire

confidence in the common and equal right of peoples to a comparative freedom of aerial circulation.

Fifthly, and lastly, there will be efforts to codify and make more definite the law of the air. Many publicists have suggested that air law has reached the stage for codification, and it will be recalled that one of the duties imposed upon the CAPA was the codification of air law. When such action as here visualized becomes a reality some of those insurmountable obstacles and hindrances that have overcome the courage and initiative of those persons engaged in aerial commerce or in its international regulation will be destroyed, and international aviation may be utilized as it deserves to be.

The international regulation of aircraft has brought a new type of law into existence. The newness of this law means that it has had, up to the present, a rather limited basis in experience. However, a goodly amount of legal thought, logic, and theory have been added to experience, and due to a wholesale application of appropriate land and sea law to suitable situations, international air law has been based upon firm and substantial foundations.

Aviation and air law, both national and international, are so relatively new that legislators, national and international, have not been able to formulate a perfect code of law based upon experience and reason. Nevertheless, if one looks over the substance of our present international air law and the multiplicity of draft codes, he finds that a great deal has been done in a very short time. Flight by heavier than air machines is of recent origin, and only a beginning has been made in the regulation of this phenomena. While a great deal has been done in the time allotted, the legal regulation of aircraft will doubtless

call for active effort for a long time to come. The importance to an international society of such regulation has been and will continue to be great.

